Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ROBERT H. YOUNG and EDX HOLDINGS, INCORPORATED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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162 pp

QUESTIONS PRESENTED

Has the federal common law doctrine enunciated in *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447 (1942) been preempted by virtue of its enactment into legislation by Congress and codification at 12 U.S.C. § 1823(e)?

May federal courts create judicial rules of law to evolve and expand either federal common law or statutory *D'Oench* to extend protection to the FDIC as receiver of a failed bank from an innocent party's state law claims, wherein there is no agreement, secret or otherwise, and no asset of the bank is involved?

LIST OF PARTIES

In accordance with Sup. Ct. R. 14.1(b), the Petitioners submit the following list of all parties to the proceedings in the lower courts:

The Petitioners, all original plaintiffs below, include:

Robert H. Young (Young); and

EDX Holdings, Inc. (EDX).

The Respondents and all original defendants below, include:

Federal Deposit Insurance Corporation (FDIC), as receiver for Hilton Head Bank & Trust Company, N.A. (HHB&T);

Tom Ruhf (Ruhf), President of HHB&T;[1]

George Strickland (Strickland), Vice-Chairman, Vice-President, and Trust Officer of HHB&T;

Price Waterhouse, Chartered Accountants;[2]

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1. Petitioners entered into a settlement agreement with Defendants Ruhf and Strickland prior to oral argument in the Fourth Circuit.

2. Young created the denominations Price Waterhouse — United States (PW-US) and Price Waterhouse — Bahamas (PW-Bahamas) to distinguish the two (2) Respondents. Both entities operate simply as "Price Waterhouse." Neither Price Waterhouse's letterhead nor its literature make any distinction between the partnerships. The names of the individual South Carolina partners appear in the caption and are omitted herein.

First Pacific Corporation (FPC);

Swiss-American Fidelity Insurance Company and Guarantee, Limited (SAFIG);

Attilio Francuilli (Francuilli), a principal of FPC and SAFIG;

Tony Habib (Habib), a principal of FPC and SAFIG;[3]

John Roche (Roche), General Manager of SAFIG;

Corporation House, Ltd.;[4]

Bruce Benn (Benn), an attorney with Corporation House, Ltd.;

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3. The district court entered an order dismissing Defendant Habib for lack of personal jurisdiction, from which order Petitioners did not take appeal.

4. Petitioners agreed to a settlement with Defendants Corporation House and Bruce Benn prior to the appeal.

Members, Board of Directors for HHB&T):[5]

Raymond Jones; William Ruth; Alfred Martin; General Bennett; Tom Whelan; Claude Surface; Con Fecher; Ed Hughes; Helen Cork; and William Eaxley; and

Employees of HHB&T:

Ann Grossheusch, Cashier; and Cathy McGill, Trust Department Officer.

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5. The district court entered summary judgment in favor of Defendants HHB&T Board members and employees, from which order Petitioners did not take appeal.

CORPORATE DISCLOSURE STATEMENT

In accordance with Sup. Ct. R. 29.6, Petitioners state the following:

> EDX Holdings, Inc. has no parent corporation and is not the parent of any subsidiary corporation.

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OPINIONS BELOW

On April 24, 1990, the United States District Court for the District of South Carolina issued an order granting Defendant HHB&T's motion to dismiss RICO and wrongful dishonor claims; denying HHB&T's motion to dismiss conversion, fraud, civil conspiracy, and South Carolina Unfair Trade Practices Act (SCUTPA) claims; and granting HHB&T's motion for partial summary judgment with respect to the conversion claim. Appendix G at 89a.

On October 16, 1992, the District Court issued an order granting Price Waterhouse's motion to dismiss the Bahamian partnership for lack of personal jurisdiction and the South Carolina partners of the United States' partnership for failure to state a claim upon which relief may be granted. Appendix F at 72a.

On September 29, 1993, the District Court issued an order granting the FDIC's motion for summary judgment on the civil conspiracy, wrongful dishonor, and fraud (in part) claims, as well as on the issue of the recovery of punitive damages against the FDIC, and denying summary judgment on the SCUTPA and fraudulent misrepresentation claims. Appendix E at 62a.

On May 3, 1994, the District Court issued an order granting the FDIC's motion for reconsideration and granting summary judgment on the SCUTPA claim. The court reinstated the cause of action for civil conspiracy, reversing its order of September 29, 1993. Appendix D at 49a.

On December 9, 1994, the District Court issued an order granting summary judgment to the FDIC on the remaining causes of action for civil conspiracy and fraudulent misrepresentation. Appendix C at 33a. On December 13, 1994, the court issued a

memorandum order amending its December 9 order, to clarify two clerical errors. Appendix B at 30a.

On January 10, 1997, the United States Court of Appeals for the Fourth Circuit issued an opinion affirming the District Court, which opinion is reported at 103 F.3d 1180 (4th Cir. 1997). Appendix A at 1a. On March 10, 1997, the Fourth Circuit Court issued an order denying Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*. Appendix H at 120a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The opinion and judgment of the court of appeals was entered on January 10, 1997. The order of the court of appeals denying Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on March 10, 1997 and constituted the final disposition of the case.

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1823(e)(1) provides:

> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance Corporation (FDIC)] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement —
>
> (A) Is in writing,

(B) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) Was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) Has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1821(d)(2)(A)(i) provides:

(2) General powers

(A) Successor to institution

The [FDIC] shall, as conservator or receiver, and by operation of law, succeed to —

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution[.]

12 U.S.C. § 1821(d)(2)(H) provides:

> The [FDIC], as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

STATEMENT OF THE CASE

This case presents several issues of major importance. The decision of the Fourth Circuit Court of Appeals is in conflict with those of the United States Supreme Court and of several of the United States Courts of Appeals. The issues presented include: (1) whether the federal common law doctrine enunciated in *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447 (1942) has been preempted by enactment of the Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 13(e), 64 Stat. 873, 889 [codified at 12 U.S.C. § 1823(e)], as reiterated pursuant to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 217(4), 103 Stat. 183, 256 [also codified at 12 U.S.C. § 1823(e)]; and (2) whether federal courts may expand federal common law or statutory *D'Oench* to extend protection to the FDIC as receiver of a failed bank from an innocent party's state law claims, wherein there is no agreement, secret or otherwise, and no asset of the bank is involved.

This case arose as a result of a conspiracy to defraud Robert H. Young. Officers of Hilton Head Bank and Trust (HHB&T) and other Respondents formed the consummate conspiracy by which they successfully defrauded Young and numbers of other brokers and investors, including businessmen and retirees. As a result of this conspiracy, Young lost $602,500 to these Respondents and suffered additional losses in excess of $86,000

in fees and tax penalties and $3,000,000 in lost profits. Young filed suit, *inter alia*, for conspiracy, fraudulent misrepresentation, fraud, wrongful dishonor, negligence, and violations of the South Carolina Unfair Trade Practices Act (SCUTPA).

The decision of the Fourth Circuit Court of Appeals in this case affirms the protections afforded the FDIC, as a receiver for a failed bank, pursuant to the federal common law *D'Oench* doctrine, and extends the protection to serve as an absolute bar to the state law claims of a wholly innocent creditor. Young knows of no other case decided on *D'Oench* grounds, wherein the party barred from asserting his claim sent money to the bank and received nothing from the bank. Young was not a borrower or a customer, nor does he rely upon any agreement with the bank. Rather, Young was the holder of a unilateral promise to pay. Young sent $550,000 to HHB&T; he received a $550,000 letter of credit, payable by HHB&T; the conditions precedent to payment were met; HHB&T confirmed the letter of credit; Young made demand on the letter of credit; and HHB&T refused to pay. More than two (2) years after filing suit, the FDIC was appointed to serve as Receiver of HHB&T.

The Fourth Circuit held that common law *D'Oench* barred Young's wrongful dishonor, SCUTPA, and fraud claims against the FDIC, on the sole basis that the HHB&T letters of confirmation were not located in the bank's records.[6] This is a factually intense and complex case, one which was never

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6. In its application of *D'Oench* as a bar to Young's fraud claim, the court focused upon an escrow agreement between Young's bank and HHB&T and the oral representations of SAFIG, finding that Young sought to assert an oral agreement different than the written agreement found in the bank's records. Although the court misstated the terms of the escrow agreement, Young does not rely upon the agreement or the oral representations of SAFIG in its claims against the bank, nor is the escrow agreement at issue in any respect. The court's focus was misdirected.

appropriate for summary judgment. Although the Court of Appeals' recitation of the facts is basically accurate, significant inaccuracies appear in the characterization, interpretation and, application of the facts in the court's reasoning, an example of which is noted above. Young petitioned the court for a rehearing in light of this Court's decisions in *Atherton v. FDIC, as Receiver for City Sav., F.S.B.*, 117 S. Ct. 666 (1997) and *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994); this Court's reversal of *David S. Hess, et al. v. F.D.I.C.*, 83 F.3d 1317 (11th Cir. 1996), No. 96-106 (Sup. Ct. 01/21/97) [styled the *Motorcity* case], an Eleventh Circuit case upon which the Fourth Circuit relied; this Court's implied affirmation of *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995) (*en banc*); and the court's misinterpretation of the facts and applicable state law. In denying the Petition, the Fourth Circuit impliedly rejected the applicability of this Court's reasoning in the *Atherton* and *O'Melveny* decisions to the federal common law *D'Oench* doctrine. The Fourth Circuit has since applied the Court's reasoning in these decisions to a case involving a different FIRREA statute, but opined in dicta that "[T]he *D'Oench Duhme* holding may well fit into the 'few and restricted' cases that the Supreme Court in *O'Melveny* held do require federal common law rules of decision." *Fed. Fin. Co. v. Hall*, 108 F.3d 46, 49 (4th Cir. 1997).

A. Statement of Facts

Robert H. Young is in the oil business. In 1986, Young decided the climate was right for the acquisition of gas and oil properties. Young compiled a strategic business plan in which he identified and evaluated $600,000,000 in oil properties. Young formed EDX Holdings, Inc. to acquire the properties. Young sought financing and contacted ABN Bank of Canada, a bank with a history of oil and gas lending. ABN referred Young to attorney Bruce Benn of Corporation House. Young paid Benn $50,000 to act as his agent. Benn suggested credit enhancement,

a vehicle used for financing large acquisitions. Young would obtain letters of credit to be used as security to borrow the $600 million required to buy the oil properties. The letters of credit would be secured by a surety bond. The bonding company would hold a lien on the acquired properties. Swiss-American Fidelity Insurance Company and Guarantee (SAFIG) was to provide the surety bond. First Pacific Corporation (FPC) was to obtain letters of credit to be issued by European banks in favor of EDX Holdings and secured by the surety bond. Young had just entered the conspirators' web.

The involvement of HHB&T in the conspiracy began with its association with John Roche. In 1986, through George Strickland, Vice-Chairman of the Board, Vice-President, and Trust Officer of HHB&T, a lending relationship had developed between HHB&T and Roche. Roche would never repay the majority of his loan debts to HHB&T. By lending themselves to the conspiracy, officers of HHB&T saw an opportunity to secure payments on Roche's loans as well as to secure financial benefits for themselves. In 1987, Roche and HHB&T began working with Tony Habib and Attillio Francuilli, principals of FPC, to secure financing for one of Roche's projects. Strickland now turned daily Roche matters over to an HHB&T Vice- President, Mark Feaster.

By late 1987, Tom Ruhf, President of HHB&T, and Feaster met with the first known victim, Edmund Danzig, who was asked to guarantee two notes for Roche in the sum of $620,000 to pay FPC's fee. HHB&T officers assured Danzig the guarantee would be secure and represented to him that Roche had recently deposited $12 million at HHB&T. HHB&T loaned the fee to Roche, giving FPC a $400,000 letter of credit and a $220,000 cashiers check. The deal was never consummated, but FPC kept the $220,000. Roche did not repay the loan. HHB&T attempted to collect from Danzig; however, the attempt to defraud Danzig

ultimately failed. Danzig was able to avoid the liability due to improprieties in HHB&T's actions.

In the Spring of 1988, Roche became an agent and employee of Habib and Francuilli, as general manager of SAFIG. The conspiracy was being refined. Where the conspirators had previously falsely represented that Roche had $12 million on deposit at HHB&T, they now falsely represented that SAFIG had $12 million on deposit at HHB&T. In June, 1988, SAFIG and HHB&T executed a Trust Deposit Agreement. Pursuant to its terms, SAFIG agreed to deposit $12,050,000 at HHB&T, and HHB&T agreed to confirm to SAFIG policy holders that such funds were held in escrow by the bank. The Agreement further provided that funds were not to be withdrawn or encumbered up to the dollar equivalent of the insurance guarantees confirmed by HHB&T.

On July 29, 1988, Habib signed a financial statement prepared for SAFIG by its Controller, Pedro Valentin, which reflected a solitary asset, $12,050,000 cash. Valentin obtained a letter from Feaster confirming that the funds were on deposit at HHB&T pursuant to the Trust Deposit Agreement. Price Waterhouse[7] provided SAFIG an audit letter, stating that the SAFIG financial statement accurately reflected SAFIG's true financial position as of August 26, 1988, to wit: SAFIG had

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7. Price Waterhouse audits, letterhead, and literature make no distinction as to the various world-wide entities bearing this name and doing business as Price Waterhouse. Pursuant to secret agreements, the individual partnerships disclaim any relationship or shared liability among the various entities. The Fourth Circuit opinion denominated the Bahamian and United States partnerships PW-Bahamas and PW-US, respectively. As counsel advised the court at oral argument, these denominations were created by Young to distinguish the two (2) Respondents and appear only in his briefs.

$12,050,000 in cash on deposit in a South Carolina bank. The audit letter was based upon a standard bank confirmation from HHB&T. The conspirators would use these documents and additional written and oral representations and confirmations to defraud their victims. The documents and representations were all false. SAFIG never had $12 million dollars on deposit at HHB&T or elsewhere.

On September 9, 1988, Young and Benn met Roche, who presented himself to Young as a principal of SAFIG. Young paid SAFIG an application fee of $2,500. The premium for the surety bond would be $2.2 million. A down payment of $550,000 was required. Benn had purportedly investigated FPC and SAFIG and had assured Young that both were reputable firms. In August, 1988, Benn had received the audited financial statement of SAFIG. Young relied upon the financial statement because of the Price Waterhouse audit letter, the Trust Deposit Agreement, and a number of independent confirmations by HHB&T officers.

Thereafter, Young met with Benn, Roche, Habib and Francuilli regarding the financing. Young gave SAFIG a $550,000 letter of credit from his Dallas bank, Northpark National Bank (NPNB), as a deposit on the premium for the surety bond, which sum was to remain refundable until such time as Young authorized issuance of the surety bond. Young received a SAFIG binder to issue the surety bond; an agreement was reached with FPC. Days later, Francuilli attempted to cash the letter of credit at BCCI in Miami. BCCI was suspicious and declined to do so, as NPNB had advised it to proceed with caution. The letter of credit was to have been held until Young approved issuance of the surety bond. When Young learned of the improper attempt to cash the letter, he insisted that Benn discontinue the association with FPC. Young knew Francuilli and Habib as principals of FPC, but was not yet aware that they were also in control of SAFIG. Benn and Roche assured Young that FPC was out of the deal.

To retrieve the letter of credit, Young borrowed $550,000 cash from NPNB. NPNB was misled to believe that HHB&T had possession of the letter of credit and had negotiated an Escrow Agreement with Feaster and Strickland to ensure the proper exchange of the cash for the letter of credit. Under its terms, HHB&T was to return the NPNB letter of credit that Young had delivered to SAFIG, and NPNB was to transfer an equivalent cash amount to HHB&T. HHB&T was to issue a letter of credit to NPNB to secure the cash, whereupon the cash could be released to SAFIG. Pursuant to the Trust Deposit Agreement, the funds would remain in SAFIG's account at HHB&T, pending issuance of the surety bond.

On September 25, 1988, Roche agreed to pay Feaster for an option to buy worthless stock owned by Feaster. Roche later paid Feaster $40,000. In early pleadings in this matter, HHB&T would assert that Feaster acted alone because he was bribed by the other conspirators. Facts indicate that he was not the only HHB&T officer involved and that both the officers and HHB&T benefitted.

On September 27, 1988, Feaster went to Miami to retrieve Young's letter of credit. SAFIG refused to deliver it without cash in return. Feaster gave SAFIG an HHB&T cashiers' check for $550,000 in exchange for the letter of credit. There can be no logical explanation for HHB&T to risk its own half-million dollars to retrieve a letter of credit in which it had no interest other than HHB&T's involvement in the conspiracy. Feaster forwarded the letter of credit to NPNB. NPNB wired the $550,000 cash to HHB&T. Contrary to the prior understanding, NPNB received a letter of credit issued by SAFIG (rather than HHB&T), which was presentable at HHB&T. HHB&T wired the money to SAFIG's Miami bank and stopped payment on the HHB&T cashiers' check.

On October 5, 1988, HHB&T received $85,000 of Young's money towards payment on the Colleton Associates account, one of Roche's accounts. The nexus is found in HHB&T's instructions to SAFIG regarding its requirements for release to SAFIG of the $550,000. On September 30, 1988, Feaster had written to SAFIG:

> In order to consummate the transaction with NorthPark National Bank, per our Escrow Agreement, we will need the following: . . . 5. In separate letter, send authority for transfer of funds to Colleton Associates, spelling out the exact amount to be transferred.

The Escrow Agreement with NPNB contained no such term, and the Colleton account had no connection to the transaction. The clear inference is that HHB&T was involved in and benefitted from the conspiracy to defraud Young.

Following receipt of Young's money, Habib and Francuilli did not follow through with the Young deal. SAFIG's letter of credit to NPNB to secure Young's $550,000 was renewed twice. SAFIG assured Young and NPNB that the $550,000 was to remain at HHB&T, in accordance with the Trust Deposit Agreement referred to in the audited SAFIG financial statement. SAFIG issued another binder to Young, executed on January 16, 1989. NPNB sought confirmation from HHB&T of the SAFIG letter of credit. NPNB repeatedly requested written confirmation of the letter of credit and was assured by Feaster that confirmation was forthcoming. The District Court found that Feaster's letters of January 9 and 20, 1989 evidenced that HHB&T had confirmed the letter of credit months after sending the funds to SAFIG's Miami bank.

On January 24, 1989, NPNB made demand on HHB&T for payment of the SAFIG letter of credit. HHB&T continued to stall and did not respond officially until February 13, 1989. Feaster falsely represented that SAFIG had sufficient funds at HHB&T to repay the $550,000 and that HHB&T was waiting for complete instructions from Roche. Roche sent HHB&T written authorization and instructions to pay the letter of credit on demand and without delay. HHB&T signed a written acknowledgement of the instructions, but did not proceed accordingly. On February 24, 1989, Young's attorneys sent demand letters to SAFIG and HHB&T. Roche and Benn assured Young that the SAFIG letter of credit would be honored and that Young would be repaid the $550,000. SAFIG paid one month's interest on Young's loan at NPNB, and the conspirators continued to promise to pay.

On January 30, 1989, HHB&T and SAFIG had renewed the Trust Deposit Agreement, whereby funds from the fictitious $12 million were to be held in escrow to secure SAFIG policy holders. An updated SAFIG financial statement reflected assets in excess of $262 million, including $12.5 million in cash. These documents were used to defraud additional victims, including an unwitting broker, Tom DeJordy, and his agents. These brokers sold SAFIG letters of credit to individuals, including their own relatives, all of whom were defrauded. These victims brought an action against these Respondents, which action (styled the *Baker* case) was pursued in the district court contemporaneously with the *Young* case and was considered for consolidation with *Young*.

Through March, 1989, HHB&T worked with the other conspirators on the SAFIG letter of credit program. In April 1989, the scheme began to fall apart with the Respondents blaming one another. On May 2, 1989, Benn informed Young that he had spoken to Strickland, that Young's money was gone,

and that SAFIG had never had $12 million at HHB&T. Young cashed in IRA's to repay NPNB the $550,000 loan, losing nearly $85,000 in tax penalties as a result. NPNB assigned its interest in the letter of credit to Young. Because he had not timely obtained financing, he further lost the opportunity to purchase the properties he had identified, all of which are immensely profitable today.

On June 2, 1989, Young filed suit against HHB&T and the other Respondents. More than two (2) years after Young filed suit, on August 30, 1991, HHB&T was declared insolvent by the Comptroller of the Currency. The FDIC was appointed receiver. Roche was convicted and sentenced to prison on related matters; Habib is currently serving a prison term for unrelated matters.

B. Jurisdiction

Subject matter jurisdiction in the United States District Court for the District of South Carolina was based upon diversity of citizenship (28 U.S.C. § 1332) and violations of federal law. Young has since abandoned his federal law claims and asserts only state law claims.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court; has rendered a decision on an important matter in conflict with the decision of another United States Court of Appeals; has rendered a decision in which misapplications of federal and state law are premised upon flawed factual findings; and has rendered a decision in which federal and state rules of law are improperly stated. For these reasons, this case merits review.

I.

THE DECISION BELOW EXEMPLIFIES THE EXIGENCY OF REVIEW BY THE COURT OF THE COMMON LAW *D'OENCH, DUHME* DOCTRINE.

The Fourth Circuit has decided an important question of federal law which has not been, but should be squarely addressed and settled by the Court. The issues presented are whether or not the federal common law *D'Oench* doctrine has been preempted by the enactment and codification of the doctrine at 12 U.S.C. § 1823(e)[8] and the extent to which federal courts may create judicial rules of law to evolve and expand application of either federal common law or statutory *D'Oench*. Although the Court's decisions have impliedly addressed both issues, as discussed more fully herein, the Court has not had occasion to address these issues directly.

This case is not the paradigmatic *D'Oench* case of a party seeking to avoid a financial commitment to a failed bank. It is indicative of the seemingly limitless expansion of the doctrine by certain circuits and the unjust results that ensue thereby. The principle of equitable estoppel, enunciated by this Court in the *D'Oench, Duhme* case and enacted into legislation by Congress, has been twisted and expanded by some federal courts to include virtually any claim or defense against a failed bank in FDIC receivership. The genesis of *D'Oench* was in equity, but federal courts have refashioned the rule into an inequitable one.

In *Young*, the Fourth Circuit held that statutory *D'Oench*

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8. The importance of this issue is demonstrated in recent actions of the FDIC. Following the *Young* and *Atherton* decisions, the FDIC announced a new policy, whereby the enactment of FIRREA serves as a demarcation line for future cases. The Corporation will assert common law *D'Oench* in pre-FIRREA cases and statutory *D'Oench* in post-FIRREA cases.

did not preempt the federal common law doctrine and that the two rules of law remain separate and independent grounds for decision, acknowledging that the Fourth Circuit and other courts often construe the two in tandem. The court further held that Young's wrongful dishonor, SCUTPA, and fraud claims were barred by the common law *D'Oench* doctrine. After setting forth the original *D'Oench* test, the court stated:

> Courts have expanded the doctrine, and it now applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records.

Young v. F.D.I.C., 103 F.3d 1180, 1187 (4th Cir. 1997).

The Fourth Circuit ignored essential criteria for proper application of either common law or statutory *D'Oench*, as have various of the other federal circuit courts. Wholly absent in respect to Young's claims are the following: an asset of HHB&T; a loan or similar transaction; an obligation or debt owed by Young to HHB&T; collusion between Young and HHB&T; any instrument executed by Young that did or was likely to deceive the FDIC; or an agreement between Young and HHB&T, secret or otherwise.

The *Young* decision is premised solely upon the absence in HHB&T's records of the HHB&T confirmations of the letter of credit held by Young's bank and the erroneous characterization of those confirmations as agreements. A confirmation is not an agreement. It is a unilateral promise to honor an obligation. Pursuant to state law, a confirming bank, even if not the issuing bank, becomes directly obligated on the credit to the extent of its confirmation, as though it were an issuer. Prior to the receivership, the District Court had concluded that the evidence showed HHB&T was a confirming bank under South Carolina

law, sustaining the wrongful dishonor cause of action against HHB&T. The FDIC does not dispute this, but rather relies upon *D'Oench*.[9]

It is further undisputed, and the District and Appeals Courts so found, that Young was innocent of any wrongdoing. At the heart of *D'Oench*, as with any equitable doctrine, is the notion that a party should not benefit from his own wrongdoing. "Estoppel is an equitable doctrine invoked to avoid injustice . . . the party claiming the estoppel must have relied on the adversary's conduct . . . as to change his position for the worse." *Heckler v. Community Health Servs. of Crawford*, 104 S. Ct. 2218, 2223 (1984). In *Young*, the opposite result occurs. The Fourth Circuit declined to carve out an exception for an innocent party.

Finally, the Fourth Circuit extended the doctrine to encompass liabilities of the bank, holding:

> The purposes underlying the *D'Oench* doctrine do not support a "specific asset" limitation . . . we hold that the common-law *D'Oench* bars both claims relating to a specific asset of the bank and claims relating to a liability of the bank.

Young at 1189.

The opinion of the Fourth Circuit in *Young* evinces the exigency of this Court's review of the *D'Oench* doctrine and establishment and clarification of its parameters. The limitless

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9. As the district court acknowledged, "[n]o one is likely to memorialize an agreement or intention to commit a tort." *citing Jones v. RTC*, 7 F.3d 1006, 1015 (11th Cir. 1993).

expansion and application of this doctrine by several of the federal circuit courts continues to unjustly bar innocent claimants from pursuit of valid state law claims, solely because the shoes of the tortfeasor are now worn by the FDIC.

II.

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

The Fourth Circuit's decision conflicts with applicable decisions of this Court. Pursuant to those decisions, the federal common law *D'Oench* doctrine has been preempted by Congress' enactment of legislation codified at 12 U.S.C. § 1823(e),[10] and neither federal common law nor statutory *D'Oench* are applicable to the facts in *Young*. As enunciated by this Court and as applied by some circuits, *D'Oench* is a sound rule of law.

The Fourth Circuit's application of *D'Oench* to bar Young's claims conflicts with both this Court's decision creating the common law rule and the clear language of the statutory rule. In *D'Oench*, a securities dealer sold bonds to a bank; the issuer subsequently defaulted. To avoid carrying past due bonds on the bank's books, the bank made a secret agreement with the dealer. The dealer executed unconditional notes in the face amount of the bonds and made interest payments. The bank agreed not to call for payment of the notes and to repay all

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10. Although most authorities and commentators suggest that the doctrine was preempted pursuant to the enactment of FIRREA in 1989, this Court's decisions would suggest that it was preempted when initially enacted in 1950. FIRREA is acknowledged to be more expansive than its predecessor, and various of its statutes reference and thereby expand application of § 1823(e); however, the language of the *D'Oench* provision itself was not altered by FIRREA.

interest. When the bank failed, the FDIC demanded payment of the notes. The dealer asserted the secret agreement in defense, but the Court held that an accommodation maker is estopped from asserting a secret agreement as a defense to an action by the FDIC to collect an asset of the bank, wherein the maker has "lent himself to a scheme or arrangement whereby the [FDIC] was or was likely to be misled." *D'Oench* at 458, 460.

The doctrine was enacted into law by Congress in 1950 and was reiterated within the expansive framework of FIRREA in 1989; it is codified at 12 U.S.C. § 1823(e). The statute clearly contemplates loans or similar transactions and sets forth the criteria requisite to assertion of an agreement that tends to diminish or defeat the interest of the FDIC in any *asset* acquired by it.

The Fourth Circuit held that the federal common law doctrine has not been preempted by § 1823(e) and reasoned that, because its decision was based upon federal common law rather than § 1823(e), the fact that the letter of credit was a liability, not an asset, of HHB&T was irrelevant. However, *D'Oench* itself is grounded in federal policy concerned with accurate valuation of bank assets. Focusing on provisions of the Federal Reserve Act, the Court found:

> These provisions reveal a federal policy to protect [FDIC], and the funds which it administers, against misrepresentations as to the securities or other *assets* in the portfolios of the banks which respondent insures or to which it makes loans.

Id. at 457 (emphasis added).

The Fourth Circuit further reasoned that the policy upon which the common law doctrine is based requires that wholly innocent parties be barred from asserting claims based upon any document not found in the bank's records. However, in *D'Oench*, the Court specifically focused upon the participation of the party in the wrongdoing, holding:

> Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.

D'Oench at 459. Indeed, Justice Jackson carved out the exception to the rule. He observed that many questions of liability will best be resolved by reference to the state law upon which the parties presumably contracted. "The [FDIC] would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved." *D'Oench* at 474 (Jackson, J., concurring). Young and his bank acted in good faith and had no control over the placement or removal of documents in the records of HHB&T. The Fourth Circuit applied an equitable principle to shield a guilty party from the claims of an innocent one, on the grounds that the guilty party failed to document its own misdeeds.

The Fourth Circuit's holding not only conflicts with the doctrine enunciated by this Court, but also with recent decisions suggesting its preemption. Following the enactment of § 1823(e) in 1950, this Court did not have an occasion to address application of *D'Oench* until 1987 in *Langley v. FDIC*, 484 U.S. 86 (1987). In *Langley*, a borrower sought to avoid payment on a note on the basis that the bank had misrepresented the value

of the underlying property. In finding § 1823(e) applicable to the facts of *Langley*, the Court did not expressly address the issue of preemption of the common law rule. However, the Court implied as much, indicating that an agreement permitted by § 1823(e) "prevails even if the FDIC did not know of it . . . It would be rewriting the statute to hold otherwise." *Id.* at 95. This language negates the possibility that such an agreement may be defeated pursuant to an evolving federal common law rule. The clear inference is that common law *D'Oench* has been displaced and may not be used to vary the plain language of the statute.

Following the enactment of FIRREA in 1989, this Court first considered its effect on federal common law in 1994 in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994). In *O'Melveny*, this Court addressed 12 U.S.C. § 1821(d)(2)(A)(i), which provides that the FDIC as receiver shall . . . succeed to . . . all rights, titles, powers, and privileges of the insured depository institution, holding that, pursuant to the provision, the FDIC succeeds to the bank's claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. The Court begins by addressing the FDIC's contention that federal common law rather than state law is determinative, holding that the contention is "so plainly wrong. 'There is no federal general common law' . . ." *Id.* at 2052, 2053 [*citing Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)]. The Court explicitly rejected the FDIC's argument that the FDIC's rights pursuant to FIRREA can be augmented or modified by federal common law rules, holding:

> This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver . . . [the provision] places

> the FDIC in the shoes of the insolvent . . . under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional federal common-law exceptions is not to "supplement" this scheme, but to alter it.

Id. at 2054. A similar provision, 12 U.S.C. § 1821(d)(2)(H), requires the FDIC to "pay all valid obligations of the insured depository in accordance with the prescriptions and limitations of this chapter." *O'Melveny* and FIRREA clearly establish that the obligations and defenses of the FDIC are those of the bank under state law, absent an explicit exception within the framework of FIRREA.

As the Fourth Circuit impliedly acknowledged, the facts in *Young* do not give rise to such an exception, as § 1823(e) clearly requires an agreement that would tend to diminish the value of an asset in the hands of the receiver.[11] *O'Melveny* precludes the application of federal common law rules to augment or modify the rights of the FDIC as receiver pursuant to FIRREA, absent "a significant conflict between some federal policy or interest and the use of state law." *Id.* at 2055 [*citing Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)]. The Court found fatal to the FDIC's position its failure to identify a significant conflict. Neither the FDIC nor the Fourth Circuit identified such a conflict in the *Young* case.

Nor do the majority of *D'Oench* cases, the sole criteria for its application appearing to be the involvement of the FDIC. In *O'Melveny*, the court discussed at length the effect of the FDIC as receiver, stating, ". . . the FDIC is not the United States, and

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11. It is undisputed that *D'Oench* itself would be decided exactly the same today under 12 U.S.C. § 1823(e).

even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of [the bank]." *Id.* at 2053.

The recent opinion of this Court in *Atherton*, *supra*, reaffirmed the reasoning of *O'Melveny*, thereby impliedly affirming *Murphy*, and specifically reversing *Motorcity*. *Atherton* and other decisions of this Court clearly imply that the federal common law *D'Oench* doctrine has been preempted by virtue of its enactment into legislation by Congress.

Atherton is a negligence case brought by the FDIC, as receiver of a federally chartered bank, against the former directors and officers of the bank. This Court addressed the issue of whether federal courts deciding state law claims must apply state law, federal statutory law,[12] or federal common law and concluded that federal courts must first look to state law. The Court examined federal common law, reiterating its holding in *O'Melveny* that cases in which judicial creation of a special federal rule would be justified are few and restricted. A precondition for formulating federal common law is a specific showing of a significant conflict between a federal policy or interest and the use of state law. Rejecting each of the FDIC's arguments, the Court found no significant conflict with or threat to a federal interest. The Court concluded:

> . . . we note that here, as in *O'Melveny*, the FDIC is acting only as a receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer . . . In sum, we can find no significant conflict

12. At issue was a FIRREA statute, 12 U.S.C. § 1821(K), which the Court held did not supplant state law. Following this decision, the Court granted certiorari, reversed, and remanded *Motorcity*, a *D'Oench* case, for reconsideration in light of *Atherton*.

> with, or threat to, a federal interest. The federal need is far weaker than was present in what the Court has called the "few and restricted instances" . . . in which this Court has created a federal common law.

Atherton at 11-12.

In *Atherton* and prior decisions, this Court has repeatedly stated in clear and unambiguous language that there is no federal general common law except in few and restricted instances in which application of state law presents a significant conflict with a federal interest. Equally clear is that the FDIC, as a receiver of a failed bank, is pursuing no federal interest, and judicial creation of a federal rule of law on that basis alone is not justified and is, thereby, impermissible. Even if the equitable *D'Oench* doctrine were found to represent one of the few and restricted instances in which a common law rule is permissible, the common law rule has been preempted by § 1823(e), as discussed more fully herein. The facts in *Young* are incongruous with application of either common law or statutory *D'Oench*. The opinion of the Fourth Circuit in *Young* is in direct conflict with the opinions of this Court and should be reviewed.

III.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The Fourth Circuit Court of Appeals has rendered a decision on an important matter in conflict with the decision of another United States Court of Appeals. There has been and continues to be a split of authority among the various federal circuits on a number of *D'Oench* related issues, the primary of such issues

being whether or not § 1823(e) has preempted the federal common law *D'Oench* doctrine. The disparity among circuits is best exemplified by a comparison of *Young* to *Murphy v. F.D.I.C.*, 61 F.3d 34 (D.C. Cir. 1995).

In *Murphy*, an investor in an unsuccessful real estate venture sought damages from the FDIC as receiver of the failed bank that had financed the venture and that he asserted was responsible for his loss. In its analysis, the District of Columbia Circuit Court applied the reasoning in *O'Melveny* to the federal common law *D'Oench* doctrine, noting that, while the vitality of *D'Oench* was not directly at issue in *O'Melveny*, the court had been specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine. The court observed that the Supreme Court appears to have concluded that Congress has addressed the *D'Oench* issue and that "the need for a body of federal common law under the rubric of *D'Oench* has now 'disappeared' . . ." *Id.* at 40. The court acknowledged that the FDIC was correct in its assertion that the post-FIRREA decisions of many courts, including the D.C. Circuit Court, had explicitly stated or implicitly assumed that the federal common law and § 1823(e) remained separate grounds for decision, noting that most did so without ever considering the preemption issue. *Id.*

In *Young*, the Fourth Circuit, absent any analysis, concluded that the common law doctrine and the statute remain separate and independent grounds for decision, *citing Reding v. FDIC*, 942 F.2d 1254, 1259 (8th Cir. 1991). The Fourth Circuit was apparently unaware that the Eighth Circuit had reversed its 1991 position in 1995. Applying *O'Melveny*, the court held that FIRREA preempted the common law *D'Oench* rule. *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995). The only additional case the Fourth Circuit relied upon was the *Motorcity [Hess]*

case (11th Cir. 1996). In 1997, this Court granted certiorari, reversed, and remanded *Motorcity* for consideration in light of *Atherton*.

Concurring with the D.C. and Eighth Circuits is the Ninth Circuit (*D'Oench* has "now been overruled by the Supreme Court") *FDIC v. O'Melveny & Myers*, 61 F.3d 17, 18-19 (9th Cir. 1995) and the Third Circuit ("the *D'Oench, Duhme* doctrine may no longer be a separate bar to plaintiffs' claims") *DiMuzio v. R.T.C.*, 68 F.3d 777, 780 n.2 (3rd Cir. 1995). The Fifth Circuit has questioned its vitality ("even if we assume that FIRREA allows the extension of the jurisprudential version of the statutory one") *Alexandria Assocs., Ltd. v. Mitchell Co.*, 2 F.3d 598, 602 (5th Cir. 1993). The First Circuit has observed that "a circuit split appears to have developed over the question of whether 1823(e) has preempted *D'Oench*." *Adams v. Zimmerman*, 73 F.3d 1164, 1168-69 n. 2 (1st Cir. 1996). The split of authority among the circuits is not limited to the preemption issue.[13]

The circuits are further divided on the issue of whether *D'Oench* or § 1823(e) are applicable only to cases involving a specific asset. The Fourth Circuit in *Young* acknowledged the split on the issue of whether § 1823(e) requires an asset, but did not address it, holding that common law *D'Oench* is not so limited. In holding that common law *D'Oench* applies to

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13. Splits of authority on various *D'Oench* related issues are not merely between circuits, but within circuits. Compare *Young* to the Fourth Circuit's prior holding in regard to a liability of the bank based upon an oral contract, in which the court questioned the extension of the scope of *D'Oench* and § 1823(e) beyond cases involving loans, finding that *Sebastian* did not present the typical *D'Oench* scenario. "Typically, *D'Oench* arises to bar a claimant from disputing the enforcement of a written loan agreement based upon an oral agreement that the claimant professes to have entered into with a bank official." *Sebastian Assocs. v. Resolution Trust Corp.*, 43 F.3d 106 (4th Cir. 1994).

liabilities as well as assets of failed banks, the Fourth Circuit found persuasive the reasoning of the First, Second, Fifth, Sixth, Ninth, and Eleventh Circuits.[14] Conversely, as discussed more fully herein, the Eleventh Circuit has upheld the asset requirement. *Vernon v. FDIC*, 981 F.2d 1230, 1233-34 (11th Cir. 1993).

The first and most apparent split on the asset issue is found in those authorities that have pronounced the demise of common law *D'Oench*, which authorities cannot be said to concur with the Fourth Circuit's extension of the doctrine to liabilities. As discussed herein, included in those authorities cited by the Fourth Circuit are the Ninth Circuit, which had reversed its position prior to the *Young* decision; the First and Fifth Circuits, which have questioned the vitality of *D'Oench*; and the Eleventh Circuit, which has been directed by this Court to reconsider its position.

The secondary split is found within those circuits that continue to apply the common law doctrine. *OPS*, 922 F.2d 306 (11th Cir. 1993), the Eleventh Circuit case upon which the Fourth Circuit relied for the proposition that liabilities, specifically letters of credit, are barred by *D'Oench*, illustrates not only the split, but the confusion among and within the various circuits. Earlier the same year as *OPS*, the Eleventh Circuit had declined to apply *D'Oench* to bar freestanding tort claims that are not related to a specific asset acquired by the FDIC from a failed bank. *Vernon v. FDIC*, 981 F.2d 1230, 1233-34 (11th Cir. 1993). The court reiterated its prior finding that, in every *D'Oench* case

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14. Respectively, *Timberland Design, Inc. v First Serv. Bank for Sav.*, 932 F.2d 46 (1st Cir. 1991); *Inn at Saratoga Assocs. v. FDIC*, 60 F.3d 78 (2nd Cir. 1995); *Bell & Murphy and Assocs. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir. 1990); *Hall v. FDIC*, 920 F.2d 334 (6th Cir. 1990); *Brookside Assocs. v. Rifkin*, 49 F.3d 490 (9th Cir. 1995); and *OPS Shopping Ctr., Inc. v. FDIC*, 922 F.2d 306 (11th Cir. 1993).

save one, the FDIC was asserting or defending a debt or monetary obligation owed to the failed bank. *Vernon* at 1233. The court expressly distinguished its *Vernon* holding in its *OPS* decision. *OPS* at 311. Distinguishable from *Young* as well, *OPS* concerned an extension of credit and collusion between the parties and the bank in a scheme designed to deceive the FDIC. The bank was subject to a cease and desist order issued by the FDIC, which specifically prohibited it from extending further credit to those very parties. Finding that the relevant parties lent themselves to a scheme whereby the banking authority was likely to be misled, the Eleventh Circuit applied *D'Oench* to the liability. *OPS* at 309.

The Fourth Circuit further acknowledged a split of authority on the completely innocent borrower exception enunciated by the Ninth Circuit in *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974). Addressing this issue of first impression, the Fourth Circuit concluded that *Meo* is based upon an outdated understanding of *D'Oench* and that the completely innocent borrower exception conflicts with the underlying rationale of *D'Oench*. Relying upon decisions of the First, Fifth, and Eleventh Circuits,[15] the Fourth Circuit declined to recognize an exception for an innocent borrower or, as is the case in *Young*, an innocent creditor. As previously discussed, the First Circuit had questioned the vitality of *D'Oench*, and the Eleventh Circuit has been instructed, in one of the very cases cited, to reexamine its position. As with the asset issue, the primary conflict with the Fourth Circuit's holding is found within those circuits, which no longer recognize the common law *D'Oench* doctrine.

This is not an exhaustive recitation of the conflicting rules

15. Respectively, *In Re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332 (1st Cir. 1992); *Dendinger v. First Nat'l Corp.*, 16 F.3d 99 (5th Cir. 1994); *FSLIC v. Gordy*, 928 F.2d 1558 n.14 (11th Cir. 1991); and *Motorcity [Hess]* (11th Cir. 1996).

on *D'Oench* related issues applied among and within the various circuits. As the Fourth Circuit and other circuits have noted, *D'Oench* and § 1823(e) are often construed in tandem, frequently without reference to the actual rule being applied. The two (2) major camps that have emerged are those circuits that have concluded *D'Oench* has been preempted and those that have conversely concluded *D'Oench* may be further expanded to supplement its statutory counterpart. The latter, best exemplified by the Fourth and Eleventh Circuits, have failed to follow their own precedents in order to make the *D'Oench* shoe fit where the statutory one clearly does not. The *Motorcity* opinion represents a vast departure from *Jones v. RTC*, 7 F.3d 1006 (11th Cir. 1993), wherein the Eleventh Circuit held *D'Oench* and 1823(e) to be inapplicable to a tort action, where the party did not seek to enforce a secret agreement, noting that the commission of a tort has no bearing on the validity of the institutions recorded assets. The court further noted that no one is likely to memorialize an agreement or intention to commit a tort. The court concluded, "[T]hat is not what § 1823(e) says, and we think it an unwarranted extension of the language to engraft that reading upon either *D'Oench* or § 1832(e)." *Id.* at 1015. The Fourth Circuit has similarly departed from its prior decision questioning the extension of *D'Oench* to transactions other than loans in *Sebastian* to expanding its application to an innocent creditor in *Young*. The conflict of the *Young* decision with the decisions of other circuits and the tremendous disparity among the circuits crave review by the Court.

IV.

THE DECISION BELOW IMPROPERLY STATES APPLICABLE STATE LAW AND FACTS.

The Fourth Circuit has rendered a decision in which misapplications of federal and state law are premised upon

flawed factual findings, most notably that the confirmations constituted "an agreement" between Young and HHB&T, that HHB&T did not benefit from the conspiracy, that Young relies upon the Escrow Agreement, and the terms of that agreement. The court has rendered a decision in which state rules of law are improperly stated, most notably the equitable doctrine of partnership by estoppel, the South Carolina Unfair Trade Practices Act, and South Carolina law concerning confirmations of letters of credit.

CONCLUSION

Based upon the foregoing, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JANUARY 10, 1997

Robert H. YOUNG; EDX Holdings, Incorporated, Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A.; First Pacific Corporation; Swiss-American Fidelity Insurance Company and Guarantee, Limited; Attilio Franciulli; John Roche; Tom Ruhf; George Strickland; Price Waterhouse, Chartered Accountants, a Bahamian Partnership; Lee S. Piper; Herbert C. Schulken, Jr.; Dennis J. Goginsky, and other possible partners of Price Waterhouse LLP, such as are residents of South Carolina, Defendants-Appellees,

and

Bruce Benn; Corporation House, Limited; Raymond Jones; William Ruth; Alfred Martin; General Bennett; Tom Whelan; Claude Surface; Con Fecher; Ed Hughes; Helen Cork; William Eaxley; Ann Grosshuesch; Cathy McGill, other possible officers and directors of Hilton Head Bank and Trust Company, N.A., after July 1988, not yet ascertained; Hilton Head Bank & Trust Company, N.A.; Tony Habib, Defendants.

No. 95-1897.

United States Court of Appeals,
Fourth Circuit.

Appendix A

Argued Sept. 25, 1996.

Decided Jan. 10, 1997.

* * *

Before MURNAGHAN and HAMILTON, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion, Judge MURNAGHAN wrote the opinion, in which Judge HAMILTON and Senior Judge MERHIGE joined.

OPINION

MURNAGHAN, Circuit Judge:

Plaintiff-Appellant Robert Young attempted to raise $600 million to finance gas and oil investments. When the proposed financing failed, Young sued those involved in the financing arrangement. The district court dismissed the claims against some of the Appellees and granted summary judgment to the remaining Appellees. For the reasons stated below, we affirm.

I.

We recount the facts and inferences in the light most favorable to Young. *See Donmar Enters., Inc. v. Southern Nat'l Bank of N.C.*, 64 F.3d 944, 946 (4th Cir.1995). In 1986, Plaintiff-Appellant Robert Young[1] sought to acquire oil and gas reserves,

1. EDX Holdings, Inc. is also a Plaintiff-Appellant in the instant appeal. Young is the President and Chief Executive Officer of EDX Holdings, Inc.

(Cont'd)

and he approached ABN Bank of Canada (ABNB) to finance his venture. ABNB referred Young to Bruce Benn, financial advisor at corporation House, Limited (Corporation House). Benn advised Young that he could quickly raise purchase money for the oil and gas reserves through a "credit enhancement" transaction. Benn, for a fee, would arrange for First Pacific Corporation (FPC) to obtain letters of credit from international banks, and Young would then use the letters of credit as collateral to obtain a $600 million loan from ABNB. To provide security for the international banks in case Young defaulted, Young would purchase a surety bond from Swiss-American Fidelity Insurance Company and Guarantee, Limited (SAFIG). John Roche, SAFIG's general manager, would arrange the transaction for a fee. Thus, the letters of credit would secure ABNB's $600 million loan, and the surety bond would secure the international banks' letters of credit. The plan, therefore, allowed Young to shift the primary risk from himself to SAFIG.

To initiate the credit enhancement transaction, Young had to purchase a surety bond from SAFIG. SAFIG's surety bond provided $55 million worth of surety protection for a premium of $2.2 million. SAFIG required an initial deposit of $550,000 from Young to obtain the surety binder. Young did not want to pay cash for the transaction, so Young had his bank, Northpark National Bank (NPNB), issue a letter of credit for $550,000 in SAFIG's favor. On September 16, 1988, after NPNB issued the letter of credit to SAFIG, SAFIG issued a two-month surety binder in FPC's favor, which stated that it would only be effective if Young fully paid the $2.2 million premium.

(Cont'd)

For ease of reading, we refer only to Young as the Plaintiff-Appellant throughout the opinion, but such references apply equally to EDX Holdings, Inc.

Appendix A

The $550,000 deposit was supposed to be refundable until Young authorized the issuance of the surety bond. However, on or about September 20, 1988, without Young's consent or approval, SAFIG assigned the $550,000 NPNB letter of credit to FPC. Attilio Franciulli, owner and director of FPC and SAFIG, then unsuccessfully tried to cash the letter of credit at a Miami bank. After that incident, Young told Benn that he wanted nothing further to do with FPC, Franciulli, or Tony Habib, another owner of FPC. Unbeknownst to Young, however, Franciulli and Habib also owned SAFIG. Since Young was unaware of their relationship to SAFIG, he proceeded with the credit enhancement transaction with SAFIG.

For reasons unexplained in the record, SAFIG then refused to accept the NPNB letter of credit and insisted that Young pay the $550,000 deposit in cash. Young borrowed the $550,000 from NPNB. Benn assured Young that his $550,000 loan would be secured by a SAFIG letter of credit, so that if Young defaulted on the loan, NPNB could proceed against SAFIG. Young borrowed the $550,000 from NPNB, and on September 22, 1988, SAFIG issued a letter of credit for $550,000 to NPNB.

According to Young, he agreed to borrow the $550,000 from NPNB only because the SAFIG letter of credit secured the loan. Benn and Young believed that SAFIG's letter of credit provided adequate security because SAFIG had produced an audited financial statement from Price Waterhouse-Bahamas (PW-Bahamas) that stated that SAFIG had $12 million on deposit "with a U.S. bank based in South Carolina." Benn believed that Hilton Head Bank & Trust, N.A. (HHB&T) was the South Carolina bank referred to in the financial statement because Mark Feaster, an HHB&T vice president, allegedly indicated to Benn that SAFIG had $12 million on deposit with

HHB&T under a Trust Deposit Agreement. The Trust Deposit Agreement provided that SAFIG would deposit $12 million at HHB&T and that the funds would "not be withdrawn, pledged or otherwise encumbered up to the dollar equivalent of the insurance guarantees confirmed by the Bank." Young contends that Feaster executed the Trust Deposit Agreement, but both Feaster and HHB&T deny it.

PW-Bahamas based the financial statement on a Standard Bank Confirmation, purportedly signed by Feaster, which verified that SAFIG had $12 million on deposit with HHB&T. However, HHB&T's official records do not contain either the Trust Deposit Agreement or the Standard Bank Confirmation. Furthermore, it is undisputed that SAFIG never deposited $12 million at HHB&T.

HHB&T was chosen as escrow agent to facilitate the transfer of the $550,000 between NPNB and SAFIG. Accordingly, NPNB and HHB&T executed an escrow agreement on September 23, 1988. Pursuant to the escrow agreement, NPNB wired Young's $550,000 loan proceeds to HHB&T. On or about September 30, 1988, HHB&T, in accordance with the terms of the escrow agreement, forwarded the $550,000 to Credit Suisse for deposit in SAFIG'S Credit Suisse account. There is no dispute that HHB&T complied with the terms of the escrow agreement.

Young, however, contends that SAFIG orally agreed that the loan proceeds would remain on deposit at HHB&T until SAFIG issued the surety bond. The escrow agreement does not contain or reference the oral agreement, nor does any other document memorialize the oral agreement.

Young then defaulted on the NPNB loan. The letter of credit

that SAFIG provided to NPNB stated that it was "payable against presentation to [HHB&T] . . . or to Credit Suisse, Bahamas." Young claims that HHB&T also confirmed the SAFIG letter of credit. Young relies on two letters from Feaster, dated January 9 and January 20, 1989, to support his contention. The January 9 letter, on HHB&T letterhead, states: "We hereby acknowledge receipt and confirmation of the attached documentation." However, no documents are attached to the letter. The January 20 letter, also on HHB&T letterhead, confirms the SAFIG letter of credit, but is unsigned. Young contends that the two letters establish that HHB&T agreed to confirm and guarantee the SAFIG letter of credit. HHB&T's official records, however, do not contain the SAFIG letter of credit or the two January 1989 letters.

After Young's default, NPNB presented the SAFIG letter of credit, which secured Young's $550,000 loan, to HHB&T for payment. HHB&T, however, refused to pay.

On June 2, 1989, Young filed suit in the United States District Court for the District of South Carolina against several defendants: 1) HHB&T;[2] 2) SAFIG; 3) John Roche; 4) FPC; 5) Attilio Franciulli; 6) Tony Habib; 7) Corporation House; and 8) Bruce Benn. Young alleged violations of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1996), a RICO conspiracy, 18 U.S.C.A. § 1962(d)(West Supp.1996), violations of the South Carolina Unfair Trade Practices Act (SCUTPA), S.C.Code Ann. §§ 39-5-10 to -160 (Law. Co-op. 1985 & Supp. 1995), fraudulent misrepresentation, civil conspiracy, conversion, breach of

2. In August 1991, the Comptroller of the Currency declared HHB&T insolvent and the Federal Deposit Insurance Corporation (FDIC) was appointed as its receiver.

contract, and wrongful dishonor, S.C.Code Ann. § 36-5-115 (Law. Co-op. 1977).

On January 31, 1992, Young filed a second action against several additional defendants: 1) Tom Ruhf, President of HHB&T; 2) George Strickland, Vice-Chairman of the Board, Vice-President, and Trust Officer of HHB&T; 3) various other officers and directors of HHB&T; 4) the FDIC, in its corporate capacity;[3] 5) PW-Bahamas, a partnership with its principal place of business in the Bahamas; and 6) Lee Piper, Herbert Schulken, and Dennis Goginsky, partners of Price Waterhouse-United States (PW-US). Young demanded an accounting and alleged negligence, negligent supervision, and violations of the National Bank Act, 12 U.S.C.A. § 194 (West Supp.1996). The district court consolidated the two cases for trial with the consent of counsel.

On April 24, 1990, the district court dismissed all claims under the RICO statutes. The court also granted summary judgment to the FDIC on the conversion claim. Young does not appeal those rulings.

On October 16, 1992, the district court dismissed PW-Bahamas for lack of personal jurisdiction and granted summary judgment to the PW-US partners. The court denied Young's Motion to Reconsider on January 7, 1993. On March 31, 1993, the district court dismissed the claims against Habib for lack of personal jurisdiction. Young appeals the dismissal of PW-Bahamas and PW-US, but he does not appeal the dismissal of Habib.

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3. With Young's consent, the district court dismissed the FDIC, in its corporate capacity, on April 28, 1992. The FDIC remains a party, however, by virtue of its receivership of HHB&T.

Appendix A

Franciulli filed a motion on May 19, 1993 to compel Young to adhere to the terms of a release agreement that he and Young had entered. The motion also requested the court to compel Young to dismiss Franciulli from the case because of his compliance with the release agreement. At a hearing on August 3, 1993, the district court granted Franciulli's motion to enforce the terms of the release agreement, but the court required Franciulli to continue complying with his obligation under the agreement to cooperate with Young. Young now challenges the validity of the release agreement, and he appeals the district court's ruling enforcing that agreement.

On September 29, 1993, the district court granted summary judgment to the FDIC on the wrongful dishonor and fraud claims. On February 17, 1994, the district court granted summary judgment to the officers and directors of HHB&T, with the exception of Ruhf and Strickland. On May 3, 1994, the district court granted the FDIC summary judgment on the SCUTPA cause of action. Young appeals the grants of summary judgment to the FDIC, but he does not appeal the grant of summary judgment to the officers and directors of HHB&T. Young settled with Benn and Corporation House in August 1994.

The district court entered a final order on December 9, 1994 that disposed of the remaining defendants and claims. The court granted summary judgment to the FDIC on the fraudulent misrepresentation and civil conspiracy claims. The court also granted Ruhf and Strickland summary judgment on the negligent supervision claim. The court denied Young's Motion to Reconsider on March 7, 1995. Young initially appealed all of those rulings, but he settled with Ruhf and Strickland in September 1996.

Appendix A

II.

A. *Claims Against The FDIC*

The district court granted summary judgment in favor of the FDIC on all claims. We review those grants of summary judgment *de novo. Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 928 (4th Cir.1995). In order to prevail on a motion for summary judgment, the moving party must establish the absence of genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). If the moving party carries its burden, the nonmoving party may not rest on the allegations in his or her pleading, but must produce sufficient evidence that demonstrates that a genuine issue exists for trial. *Id.* at 324, 106 S.Ct. at 2553.

1. Wrongful Dishonor, SCUTPA, and Fraud Claims

Young asserts that the two January 1989 letters from Feaster prove that HHB&T agreed to confirm the SAFIG letter of credit. He argues that HHB&T wrongfully dishonored the SAFIG letter of credit when it failed to pay the letter of credit upon NPNB's presentment. He further contends that by wrongfully dishonoring the letter of credit, HHB&T engaged in an unfair trade practice under SCUTPA. Young also alleges a fraud claim based on HHB&T's transfer of the $550,000 to SAFIG pursuant to the terms of the escrow agreement. The district court granted summary judgment to the FDIC, as receiver for HHB&T, on the ground that the *D'Oench* doctrine and its partial codification, *see* 12 U.S.C.A. § 1823(e)(1) (West. Supp. 1996), bar all three claims.

Appendix A

The *D'Oench* doctrine, first described by the United States Supreme Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), "prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed bank or thrift." *Resolution Trust Corp. v. Allen*, 16 F.3d 568, 574 (4th Cir.1994). The doctrine serves two purposes. First, it allows federal and state examiners to rely on a bank's records in evaluating the institution's fiscal soundness. *Id.* at 574. Second, it "ensure[s] mature consideration of unusual loan transactions by senior bank officials, and prevent[s] fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley v. FDIC*, 484 U.S. 86, 92, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987).

The original test for determining whether claims were barred under the *D'Oench* doctrine was whether the agreement, oral or written, either was designed to deceive the public authority or would tend to have that effect. *D'Oench, Duhme & Co.*, 315 U.S. at 460, 62 S.Ct. at 680-81. Courts, however, have expanded the doctrine, and it now applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records. *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 308 (11th Cir.1993).

Congress substantially codified the elements of the common-law *D'Oench* doctrine in order to protect taxpayers, depositors, and creditors of failed financial institutions. *Allen*, 16 F.3d at 574. The statute provides in pertinent part:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it . . . as receiver of any insured

> depository institution [] shall be valid against the [FDIC] unless such agreement (A) is in writing, (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.A. § 1823(e)(1). A plaintiff must satisfy all four requirements before it can enforce an agreement against the FDIC. *Allen*, 16 F.3d at 574.

Section 1823(e) essentially encompasses the principles of the common-law *D'Oench* doctrine. *E.J. Sebastian Assocs. v. Resolution Trust Corp.*, 43 F.3d 106, 108 (4th Cir.1994). Section 1823(e) does not, however, preempt the *D'Oench* doctrine. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317, 1327-34 (11th Cir.1996). Thus, although the Fourth Circuit and other courts often construe the *D'Oench* doctrine and section 1823(e) in tandem, *see, e.g., E.J. Sebastian Assocs.*, 43 F.3d at 108, the common-law doctrine and the statute remain separate and independent grounds for decision. *Reding v. FDIC*, 942 F.2d 1254, 1259 (8th Cir.1991).

The *D'Oench* doctrine bars Young's wrongful dishonor claim. Young offers two January 1989 letters, one signed by

Feaster and one unsigned, to support his contention that HHB&T agreed to confirm the SAFIG letter of credit. However, an FDIC officer attested that HHB&T's official records contain neither the SAFIG letter of credit nor the two January 1989 letters. Young has not refuted the officer's affidavit. The *D'Onech* doctrine, therefore, prohibits Young's claim based upon HHB&T's purported agreement because the agreement is not properly reflected in HHB&T's official records.

The same reasoning bars Young's SCUTPA claim. As the district court found, Young bases his entire SCUTPA claim on the wrongful dishonor allegation. Although Young's complaint lists seven acts in addition to wrongfully dishonoring the letter of credit, none could reasonably be considered a trade practice of HHB&T because each relates to the actions of other defendants. The only "trade practice" relating to HHB&T's conduct is the allegedly wrongful dishonor of the letter of credit. As stated above, however, the agreement that formed the basis for that dishonor fails under the *D'Oench* doctrine because it is not properly reflected in HHB&T's records.

The *D'Oench* doctrine also bars Young's fraud claim. NPNB and HHB&T executed an escrow agreement that provided that HHB&T would act as the escrow agent to facilitate the transfer of Young's $550,000 loan proceeds between NPNB and SAFIG. Pursuant to that agreement NPNB wired Young's $550,000 loan proceeds to HHB&T on September 23, 1988. On or about September 30, 1988, HHB&T, in accordance with the terms of the escrow agreement, forwarded the $550,000 to Credit Suisse for deposit in SAFIG'S Credit Suisse account. No one disputes that HHB&T complied with the terms of the escrow agreement. Young, however, alleges that SAFIG orally agreed that the loan proceeds would remain on deposit at HHB&T until SAFIG issued the surety bond. The escrow agreement, which was in

the bank's official records, does not contain or reference the oral agreement, however. Nor does any other document in the bank's records memorialize the oral agreement. The *D'Oench* doctrine, therefore, prevents Young from bringing a claim based on the unrecorded oral agreement.

Young, however, argues that neither the *D'Oench* doctrine nor section 1823(e) bars his claims. He contends that the *D'Oench* doctrine does not apply because he falls under the "innocent borrower exception." He contends that section 1823(e) does not apply because his claims address a *liability* of the bank; they do not diminish or defeat any specific *asset* of the bank.

Young first argues that the *D'Oench* doctrine does not apply in the instant case because he falls under the "completely innocent borrower" exception that the Ninth Circuit developed in *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974). The *Meo* court held that the *D'Oench* doctrine did not apply because the borrower at issue was "completely innocent party." *Id.* at 792.

Although the Fourth Circuit has not previously addressed the issue, other circuit courts of appeal that have addressed the so-called "innocent borrower exception" since *Meo* have rejected it because it conflicts with the underlying rationale of the *D'Oench* doctrine. *See, e.g., Motorcity of Jacksonville, Ltd.*, 83 F.3d at 1325 (holding that the *D'Oench* doctrine applies even when the customer is completely innocent of any bad faith, recklessness, or negligence); *Dendinger v. First Nat'l Corp.*, 16 F.3d 99, 102 (5th Cir. 1994) (holding that the Fifth Circuit does not recognize an "innocent borrower" exception to the *D'Oench* doctrine); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1338 (1st Cir. 1992) (holding that no "complete innocence" exception to the *D'Oench* doctrine exists.

We agree with these courts that the Ninth Circuit's complete innocence exception "is based on an outdated understanding of the *D'Oench* doctrine." *FSLIC v. Gordy*, 928 F.2d 1558, 1567 n. 14 (11th Cir. 1991). Such an exception runs contrary to the doctrine's broad purpose of preventing private parties from enforcing claims against the FDIC based upon agreements not found in the bank's records. The need for bank examiners to rely on a bank's records in evaluating the bank's fiscal soundness remains unaffected by whether or not the customer acted innocently or negligently. Therefore, we hold that the *O'Oench* doctrine applies even when the customer is completely innocent of any bad faith recklessness, or negligence.

In regard to section 1823(e), Young points out that the statutory language prohibits claims based on agreements that tend "to diminish or defeat the interest of the [FDIC] in any *asset*" that the FDIC acquires as receiver of a failed depository institution. 12 U.S.C.A. § 1823(e)(1) (emphasis added). Young claims that since the confirmed letter of credit relates to a liability of the bank, rather than to a specific asset, section 1823(e) does not bar his claim. Several cases in other circuit courts of appeal support Young's contention. *See, e.g., E.I. du Pont de Nemours and Co. v. FDIC*, 32 F.3d 592 (D.C. Cir. 1994) (holding that section 1823(e) is narrower than the *D'Oench* doctrine and that section 1823(e) applies only to cases involving a specific asset); *John v. Resolution Trust Corp.*, 39 F.3d 773, 776 (7th Cir. 1994) ("Section 1823(e) requires an identifiable 'asset' which is acquired by the bank and then transferred to the regulatory agency, and to which the unenforceable agreements must relate."); *Murphy v. FDIC*, 38 F.3d 1490, 1500-01 (9th Cir. 1994) (*en banc*) (holding that section 1823(e) applies only to assets and does not apply to claims regarding letters of credit because letters of credit are liabilities rather than assets).

However, since we hold that the *D'Oench* doctrine bars Young's claims, we need not, and do not, address whether section 1823(e) also bars his claims or whether Congress limited section 1823(e) to claims that impair the FDIC's interest in a specific asset. Regardless of any limitation on section 1823(e), several circuit courts of appeals have specifically held that the common-law *D'Oench* doctrine is not so limited. These courts have held that *D'Oench* bars claims relating to specific assets and also bars claims relating to liabilities of a bank under FDIC receivership. *See, e.g., Inn at Saratoga Assocs. v. FDIC*, 60 F.3d 78, 82 (2d Cir. 1995) (rejecting the argument that the *D'Oench* doctrine is limited by an "asset" requirement because such a requirement "would undercut an important purpose of that doctrine — allowing the FDIC to rely on a bank's records when insuring the bank"); *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 496 (9th Cir. 1995) (holding that "the common-law [*D'Oench*] doctrine applies to bar suit even when the RTC does not acquire a specific asset whose value is affected by the alleged secret agreement"); *OPS Shopping Ctr., Inc.*, 992 F.2d at 308-10 (noting that every circuit court of appeals that has expressly addressed the asset limitation argument under the *D'Oench* doctrine has rejected it); *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 50 (1st Cir. 1991) ("*D'Oench* protects the FDIC from [the plaintiff's] affirmative claims which are based upon an alleged oral agreement to lend money in the future."); *Bell & Murphy and Assoc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir. 1990) (rejecting argument that the *D'Oench* doctrine "bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a specific asset acquired from a bank"); *Hall v. FDIC*, 920 F.2d 334, 339 (6th Cir. 1990) (holding that the *D'Oench* doctrine protects the FDIC even where the FDIC does not have "an interest in an asset"). Moreover, the Eleventh Circuit specifically has held that the

D'Oench doctrine protects the FDIC from claims regarding letters of credit. *See OPS Shopping Ctr., Inc.*, 992 F.2d at 308-10.

We find that reasoning of these courts persuasive. The purposes underlying the *D'Oench* doctrine do not support a "specific asset" limitation. The Supreme Court designed the *D'Oench* doctrine to give bank examiners an accurate picture of a bank's financial position. The records of regular banking transactions should reflect *all* of the rights and liabilities of the bank regarding such regular banking transactions in order for bank examiners to evaluate the bank's fiscal soundness. Therefore, we hold that the common-law *D'Oench* doctrine bars both claims relating to a specific asset of the bank and claims relating to a liability of the bank.

Thus, we hold that the district court properly granted summary judgment to the FDIC on the wrongful dishonor, SCUTPA, and fraud claims because HHB&T's official records do not contain the agreements that Young relies upon to support his claims, as required by the *D'Oench* doctrine.[4]

2. Civil Conspiracy and Fraudulent Misrepresentation Claims

Young also brought civil conspiracy and fraudulent misrepresentation claims against HHB&T. Young does not argue, however, and the record does not reflect, that HHB&T's board of directors ordered, authorized, or ratified any act that constituted a civil conspiracy. Nor does Young argue that

4. Because we hold that the *D'Oench* doctrine bars Young's wrongful dishonor and SCUTPA claims, we do not reach the district court's alternative holdings that Young failed to establish wrongful dishonor or an unfair trade practice as a matter of law.

HHB&T's board ordered or ratified any false representations. Rather, Young argues that HHB&T is liable under the *respondeat superior* doctrine. Thus, he contends that we should hold HHB&T vicariously liable on the civil conspiracy and fraudulent misrepresentation claims for Feaster's statement on the Standard Bank Confirmation that SAFIG had deposited $12 million dollars at HHB&T when in fact it had not.

The district court granted summary judgment to the FDIC, as receiver for HHB&T, on both claims. In regard to the civil conspiracy claim, the court found that Young failed to allege special damages, an essential element, and also failed to support the other elements of the claim. In regard to the fraudulent misrepresentation claim, the district court found that Young failed to establish that he had a right to rely on Feaster's misrepresentation, an essential element of the claim.

Although the district court granted summary judgment on the ground that Young failed to establish the state-law elements of his claims, we may affirm a grant of summary judgment on different grounds than those relied on below. *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 131 n. 6 (4th Cir. 1995). Regardless of whether Young established the required elements as to Feaster, we affirm the grant of summary judgment to the FDIC, as receiver for HHB&T, on the civil conspiracy and fraudulent misrepresentation claims on the ground that Young failed to provide any evidence that Feaster acted within the scope of his employment.

Civil conspiracy and fraudulent misrepresentation are intentional torts. *See Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981) (regarding civil conspiracy); *Fields v. Mans*, __ U.S. __, __, 116 S. Ct. 437, 444, 133 L. Ed. 2d 351 (1995)

(regarding fraudulent misrepresentation). A corporation may be held vicariously liable for such an intentional tort of its officer or agent if the officer or agent acted within the scope of his or her employment. *See Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 341 S.E. 2d 385, 387-88 (App. 1986). *See also* 18B Am. Jur. 2d *Corporations* § 2129 (1985) (collecting cases). Under South Carolina law, an act falls within the scope of employment even if the employee exceeded his or her authority and even if the employee acted contrary to the express orders of the employer. *Jamison v. Howard*, 271 S.C. 385, 247 S.E. 2d 450, 451 (1978); *Crittenden*, 341 S.E. 2d at 387. Nevertheless, an act falls within the scope of employment only if the employee acted with the purpose of benefiting the employer. *Jamison*, 247 S.E. 2d at 451; *Crittenden*, 341 S.E. 2d at 387-88. If the employee acted for some independent purpose of his own, the conduct falls outside the scope of his employment. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E. 2d 425, 429 (App. 1991); *Crittenden*, 341 S.E. 2d at 387.

In the instant case, no evidence suggests that Feaster acted with the purpose of benefiting HHB&T even incidentally, Indeed, if we accept Young's allegations as true the evidence suggests instead that Feaster acted to further his conspiracy with Franciulli and Habib and to benefit his own independent purpose of defrauding Young. Young conceded as much at oral argument. Feaster, therefore, did not act within the scope of his employment, and the FDIC, as receiver for HHB&T, cannot be held liable for his conduct.[5]

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5. Because we hold that Feaster acted outside the scope of his employment, we do not reach the issue of whether the *D'Oench* doctrine bars freestanding tort claims not based on an unrecorded agreement and not related to a specific asset of the bank.

Appendix A

B. *Claims Against Price Warehouse*

1. PW-Bahamas

Young brought a professional negligence claim against PW-Bahamas. He claimed that he relied to his detriment on a PW-Bahamas audit report that erroneously represented that SAFIG had $12 million on deposit "with a U.S. bank based in South Carolina." The district court held, however, that PW-Bahamas has insufficient contacts with South Carolina to support *in personam* jurisdiction.

We review *de novo* a district court's dismissal for lack of personal jurisdiction. *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198 (4th Cir. 1993). However, we review findings of fact pertaining to the dismissal for clear error. *Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F.3d 56, 60 (4th Cir. 1993).

Young bears the burden of establishing that personal jurisdiction exists over the nonresident PW-Bahamas. *Mylan Laboratories, Inc.*, 2 F.3d at 60. He must demonstrate two things. First, he must prove that PW-Bahamas's conduct meets the requirements of South Carolina's long-arm statute. *Id.* Second, he must prove that PW-Bahamas has sufficient contacts with South Carolina to meet the constitutional standards of due process. *Id.*

South Carolina's long-arm statute extends to the constitutional limits that the due process clause imposes. *Triplett v. R.M. Wade & Co.*, 261 S.C. 419, 200 S.E. 2d 375, 379 (1973). As a result, the state-law analysis collapses into the constitutional analysis. Under that analysis, Young must demonstrate that PW-Bahamas has sufficient "minimum contacts" with South Carolina

such that the maintenance of the suit would " 'not offend traditional notions of fair play and substantial justice.' " *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)) (internal quotation marks omitted).

As the Supreme Court has noted, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958). In other words, the defendant must have a " 'substantial connection' " with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985) (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957)).

PW-Bahamas is a partnership organized under the laws of the Bahamas, with its principal place of business in Nassau, Bahamas.[6] PW-Bahamas conducted the audit of SAFIG, also a

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6. PW-Bahamas is part of a world-wide organization of separate and independent Price Waterhouse firms that practice accountancy in various countries. The members of each Price Waterhouse firm hold shares in Price Waterhouse World Firm Limited (PW-World Firm), a limited liability company incorporated under the laws of Bermuda. PW-World Firm assists the various Price Waterhouse firms in advancing their respective practices, and it facilitates the maintenance of uniform standards of practice. It does not conduct or supervise client engagements, however. Nor does it play a part in the day-to-day management of the Price Waterhouse firms.

PW-World Firm's bylaws designate twenty-six separate "member firms" in

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Bahamian company, in the Bahamas, not in South Carolina. PW-Bahamas has no offices, agents, employees, or property located in South Carolina, and it has not engaged in any business in South Carolina. Furthermore, none of its members or employees have ever traveled to South Carolina to conduct business on the partnership's behalf.

Young bases his personal jurisdiction argument on the Standard Bank Confirmation form that was submitted to HHB&T in South Carolina to confirm SAFIG's deposits there. No evidence suggests that PW-Bahamas itself mailed the form to the bank, but some evidence does suggest that PW-Bahamas used the information contained in the form to substantiate its audit of SAFIG's financial statement. Indeed, PW-Bahamas does not deny that it received information that verified the SAFIG deposit at HHB&T. However, the sole act of using account information from HHB&T in South Carolina does not establish a "substantial connection" between PW-Bahamas and South Carolina; nor does it constitute a purposeful availment of the privilege of conducting business in South Carolina. *See Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. at 2183 (noting that the "purposeful availment requirement ensures that the defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts" (internal quotation marks omitted)).

The Supreme Court also has held that courts "must consider

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the Price Waterhouse organizations. Those member firms include PW-US and Price Waterhouse North Caribbean (PW-North Caribbean), a Cayman Islands partnership authorized to use the Price Waterhouse name pursuant to an agreement with PW-World Firm. PW-North Caribbean sub-licenses PW-Bahamas to use the Price Waterhouse name.

the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Super. Ct. of California,* 480 U.S. 102, 113, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92 (1987). In particular, the Supreme Court has held that courts should place "significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders" because of the "unique burdens placed upon one who must defend oneself in a foreign legal system." *Id.* at 114, 107 S. Ct. at 1033.

In the instant case, the balance of interests weighs against finding personal jurisdiction. PW-Bahamas likely would face a large burden if we required it to defend a claim in South Carolina. It would have to travel between Nassau and South Carolina and participate in a foreign nation's judicial system. South Carolina, the forum state, has little interest in the dispute since Young is a Texas resident and PW-Bahamas prepared the audit report in the Bahamas. Moreover, as a nonresident, Young's interest in obtaining relief in South Carolina is reduced. *See Federal Ins. Co. v. Lake Shore, Inc.,* 886 F.2d 654, 661 (4th Cir. 1989).

Despite these precedents, Young argues that PW-Bahamas could have "foreseen" that investors would rely on its audit letter. However, the Supreme Court clearly has held that "foreseeability" alone is not "a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp.,* 444 U.S. at 295, 100 S. Ct. at 566. Rather, the defendant's conduct and connection with the forum state must be such that he would reasonably anticipate being haled into court there. *Id.* at 297, 100 S. Ct. at 567.

PW-Bahamas could not reasonably anticipate defending an action in South Carolina simply because it made one

informational request of a South Carolina bank. Young essentially conceded that point during oral argument. Accordingly, we hold that the district court properly dismissed the claim against PW-Bahamas for lack of personal jurisdiction.

2. PW-US

Lee Piper, Herbert Schulken, and Dennis Goginsky are partners of PW-US, and they reside in South Carolina. PW-US[7] was not involved in the financing, and Young does not allege any wrongdoing by PW-US. Rather, Young contends that we should treat PW-Bahamas and PW-US as a single partnership doing business in South Carolina under the doctrine of "partnership by estoppel," which would make PW-US jointly and severally liable for the alleged wrongdoing of PW-Bahamas.

The district court converted PW-US's motion to dismiss into a motion for summary judgment because the parties presented evidence on the issue outside of the pleadings. The district court then concluded that no partnership existed in fact between PW-Bahamas and PW-US and that the evidence did not support a finding of partnership by estoppel. The district court, therefore, granted summary judgment to PW-US because Young failed to allege that any member of PW-US participated in preparing the audit report.

Under the Uniform Partnership Act, which South Carolina has adopted, a partnership by estoppel arises only where a person, "on the faith of" a representation of partnership by persons who are not actual partners, "give[s] credit to the actual

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7. We refer to the PW-US partnership and the three PW-US partners interchangeably as PW-US.

or apparent partnership." S.C. Code Ann. § 33-41-380(1) (Law. Co-op. 1990). Thus, partnership by estoppel arises only where one extends credit to an ostensible partnership in reliance upon a representation of partnership. *NCNB Nat'l Bank of N.C. v. Bridgewater Steam Power Co.*, 740 F. Supp. 1140, 1158 (W.D.N.C. 1990).

On appeal, Young concedes that no partnership existed between PW-US and PW-Bahamas in fact. He also admits that none of the PW-US partners participated in preparing the audit report for SAFIG. He contends, however, that the district court erred in holding that he failed to establish partnership by estoppel. Young argues that PW-US holds itself out as a single partnership with offices around the world. In support of his contention, Young submitted a PW-US brochure that his attorney picked up at a litigation services seminar. The brochure describes Price Waterhouse as one of the "world's largest and most respected professional organizations" with "offices throughout the world." Young asserts that the brochure casts Price Waterhouse as an established international accounting firm and that PW-US promotes that image to gain public confidence in the firm's stability and expertise.

Young does not, however, contend that he relied on the brochure in making his decision to invest. In fact, although Young requested and received ample opportunity for discovery on the issue, he never offered any evidence that he relied on any representation of PW-US. Furthermore, regardless of whether PW-US made any representation upon which Young relied, no evidence suggests that Young gave "credit" to anyone, much less to PW-Bahamas or PW-US. *See* § 33-41-380(1).

As discussed above, PW-Bahamas does not have a

substantial connection with South Carolina. Without such a connection *in personam* jurisdiction does not exist over PW-Bahamas unless a basis exists to treat PW-Bahamas and PW-US as a single partnership doing business in South Carolina under the partnership by estoppel doctrine. Since Young failed to establish that he relied on any representation of PW-US or that he gave credit to the alleged partnership, the district court correctly held that a partnership by estoppel did not arise. Therefore, the district court properly dismissed the claims against PW-Bahamas for lack of *in personam* jurisdiction, and the court properly granted summary judgment to PW-US because Young did not establish any wrong-doing by the PW-US partners.

C. *Claims Against Franciulli*

Young originally alleged claims of fraud, negligence, conspiracy, and unfair trade practices against Attilio Franciulli. However, given the factual complexity of the case, Young thought it prudent to form an alliance with at least one defendant. He therefore entered into a release agreement with Franciulli on December 13, 1991. The agreement provided that, in exchange for Franciulli's cooperation in Young's suit against the other defendants, Young would release all claims against Franciulli.

On March 31, 1993, the district court entered an order dismissing Tony Habib for lack of personal jurisdiction. In a footnote to that order, the district court noted that it would not rule on Franciulli's earlier motion to dismiss for lack of jurisdiction because of the seemingly valid release agreement. The court noted, however, that Franciulli could reassert the motion to dismiss if Young properly brought a subsequent motion to question the validity of the release agreement. Young did not file any such motion.

Appendix A

Franciulli filed a motion on May 19, 1993 to compel Young to adhere to the terms of the release agreement and to dismiss Franciulli from the case because of his compliance with the agreement. At a hearing on August 3, 1993, the district court granted Franciulli's motion to enforce the terms of the agreement, but the court required Franciulli to continue cooperating with Young. The court ordered Franciulli to appear for a deposition and to turn over several documents that Young's attorney had requested. Pursuant to the district court's order, Franciulli attended a deposition on September 20 and 21, 1993. On November 21, 1994, Young listed Franciulli as a witness for trial. On December 9, 1994, however, the district court entered a final order that disposed of the remaining defendants and claims, thus mooting Franciulli's appearance at the trial.

Young claims that Franciulli failed to cooperate with him and that Franciulli therefore breached the terms of the release agreement. He raised that contention below in the hearing on Franciulli's motion to enforce the release agreement. Young argues on appeal that the district court should have submitted the question of Franciulli's breach to a jury, and he contends that the district court erred in summarily dismissing Franciulli pursuant to the terms of the release agreement. Young concedes, however, that the district court did not enter any orders that actually dismissed Franciulli. He appears to contend instead that the court impliedly dismissed Franciulli when it enforced the terms of the release agreement.

Since we cannot review an order that the district court did not enter, we review only the district court's decision to grant Franciulli's motion to enforce the terms of the release agreement, which impliedly rejected Young's claim that Franciulli breached the agreement. We review the district court's decision for abuse

of discretion. *See Wilson v. Wilson*, 46 F.3d 660, 664 (7th Cir. 1995).[8]

The Fourth Circuit has clearly held that district courts possess the inherent power to enforce settlement agreements and to enter judgments based on such agreements without a plenary hearing. In *Petty v. Timken Corp.*, 849 F.2d 130, 132 (4th Cir. 1988), the plaintiff contended that the district court erred in summarily enforcing a settlement agreement without conducting an evidentiary hearing on the validity of the agreement. The Court held that when there is no doubt as to the existence of a settlement agreement, or the authority of an attorney to enter into a settlement agreement, the district court possesses the inherent authority to enforce the agreement and to enter judgment based on the agreement without a plenary hearing. *Id.*

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8. Young states in his brief that the district court "also erred in releasing SAFIG and FPC on the basis of [the release] agreement." Young correctly points out that the release agreement did not release any individual or entity besides Franciulli, and he therefore contends that the district court erred in releasing SAFIG and FPC pursuant to that agreement.

However, Young did not raise that issue before the district court. Accordingly, Young has waived his right to complain about the district court's treatment. *See Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1068 (4th Cir. 1993) (noting that appellate courts ordinarily do not consider issues that the appellant did not raise below).

Moreover, we find no evidence in the record that the district court actually or impliedly release either SAFIG or FPC pursuant to the release agreement. The record reveals instead that the district court entered a default judgment against SAFIG and FPC for failure to comply with discovery orders. We therefore do not address Young's arguments regarding the "erroneous release" of SAFIG and FPC.

In addition, the Fourth Circuit has recognized that trial courts may summarily enforce a settlement agreement in some cases even when one party claims a breach of the terms of the agreement. In *Millner v. Norfolk & W.R. Co.*, 643 F.2d 1005 (4th Cir. 1981), the Court noted:

> This summary procedure has been found to be "admirably suited to situations where, for example, a binding settlement bargain is conceded as shown, and the excuse for nonperformance is comparably unsubstantial."

Id. at 1009 (quoting *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C. Cir. 1969)). Finally, the Fourth Circuit has held that district courts also possess the inherent power to supervise and aid the implementation of settlement agreements. *See Wood v. Virginia Hauling Co.*, 528 F.2d 423, 425 (4th Cir. 1975).

In the instant case, the district court did not abuse its discretion in enforcing the terms of the release agreement. As the above precedents demonstrate, the district court possessed the inherent authority to enforce the terms of the agreement since neither party disputed that a settlement agreement existed and neither party claimed that its attorney lacked authority to enter into the agreement. Young's excuse for failing to release Franciulli and his allegations regarding Franciulli's breach are unsubstantial and conclusory; Young failed to cite to the record or to provide any evidence that Franciulli materially breached the terms of the agreement so as to void the release. Furthermore, the district court properly supervised and aided the implementation of the agreement pursuant to its inherent powers when it established the particulars of Franciulli's subsequent deposition.

Appendix A

As the Fourth Circuit held in *Petty*, 849 F.2d at 133, having second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement. We therefore hold that the district court did not abuse its discretion in enforcing the terms of the release agreement.[9]

III.

For the foregoing reasons, we affirm the district court's judgment in regard to all issues on appeal.

AFFIRMED.

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9. Although we find that Young's appeal lacks merit, we do not find that it is frivolous within the meaning of Federal Rule of Appellate Procedure 38. Accordingly, we deny Franciulli's motion for sanctions, attorneys' fees, and costs pursuant to Rule 38.

APPENDIX B — AMENDMENT TO MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, BEAUFORT DIVISION FILED DECEMBER 13, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CIVIL ACTION #9:89-1398-1

ROBERT H. YOUNG AND EDX HOLDINGS,

Plaintiffs,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A.; First Pacific Corporation; John Roche; Swiss-American Fidelity Insurance Company and Guarantee, Ltd.; Attilio Francuilli; Tony Habib; Bruce Benn and Corporation House, Ltd.,

Defendants.

CIVIL ACTION #9:92-0308-1

ROBERT H. YOUNG AND EDX HOLDINGS,

Plaintiffs,

vs.

RAYMOND JONES, WILLIAM RUTH, ALFRED MARTIN, GENERAL BENNETT, TOM WHELAN, CLAUDE SURFACE, CON FECHER, ED HUGHES, HELEN CORK, WILLIAM EAXLEY, TOM RUHF, GEORGE STRICKLAND, ANN GROSSHEUSCH, CATHY McGILL, other possible officers and directors of HILTON HEAD BANK AND TRUST,

Appendix B

N.A., after July 1988, not yet ascertained, the FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and PRICE WATERHOUSE,

Defendants.

AMENDMENT TO MEMORANDUM AND ORDER

On December 9, 1994, this court issued its Memorandum and Order granting summary judgment to the remaining defendants in the above-captioned cases. Two clerical errors have now been discovered, and the court issues this Amendment to correct those errors as follows:

The entire second paragraph on page 9 should be deleted and amended to read:

> First, and fatal to their claim, plaintiffs failed to prove that there was any representation made by HHB&T that plaintiffs could have reasonably relied upon to their detriment. The Standard Bank Confirmation received by Price Waterhouse and used in preparing the statement reviewed by Young represented only that $12,050,000 was deposited on behalf of SAFIG. The resulting financial statement did not specify HHB&T and neither document guaranteed that the monies would remain at the bank for any length of time. The Trust Deposit Agreement limits withdrawals or encumbrances by providing that the funds "shall not be withdrawn, pledged or otherwise encumbered *up to the dollar*

> *equivalent of the insurance guarantees confirmed by the Bank.*" (emphasis added) The court, however, interprets this to mean that the portion of the $12,050,000 not covered by a guarantee confirmed by the bank *could have been* withdrawn.[3] Therefore, pursuant to the terms of the agreement the monies did not have to remain in the bank.

On page 11, under *Civil Conspiracy,* the first sentence of the second paragraph should be amended to delete the words "at HHB&T." Thus, the sentence should read:

> To prove their conspiracy claim, the plaintiffs must present evidence to show that Feaster conspired with others to defraud plaintiffs.

AND IT IS SO ORDERED.

s/ Falcon B. Hawkins
Falcon B. Hawkins
United States District Judge

Charleston, S. C.
December 13, 1994.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, BEAUFORT DIVISION FILED DECEMBER 9, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CIVIL ACTION #9:89-1398-1

ROBERT H. YOUNG AND EDX HOLDINGS,

Plaintiffs,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A.; First Pacific Corporation; John Roche; Swiss-American Fidelity Insurance Company and Guarantee, Ltd.; Attilio Francuilli; Tony Habib; Bruce Benn and Corporation House, Ltd.,

Defendants.

CIVIL ACTION #9:92-0308-1

ROBERT H. YOUNG AND EDX HOLDINGS,

Plaintiffs,

vs.

RAYMOND JONES, WILLIAM RUTH, ALFRED MARTIN, GENERAL BENNETT, TOM WHELAN, CLAUDE SURFACE, CON FECHER, ED HUGHES, HELEN CORK, WILLIAM EAXLEY, TOM RUHF, GEORGE STRICKLAND, ANN GROSSHEUSCH, CATHY McGILL, other possible officers and directors of HILTON HEAD BANK AND TRUST,

N.A., after July 1988, not yet ascertained, the FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and PRICE WATERHOUSE,

Defendants.

MEMORANDUM AND ORDER

These matters are before the court on motions for summary judgment filed (1) on November 10, 1994, by the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Hilton Head Bank & Trust Company, N.A. ("HHB&T"), the remaining defendant in C/A #9:89-1398-1, and (2) on November 14, 1994, by Tom Ruhf and George Strickland ("Ruhf" and "Strickland"), the remaining defendants in C/A #9:90-0308-1. Memorandums in opposition and reply memorandums were filed in response to these motions.

On December 1, 1994, the court heard a full day of oral argument. After a review of the entire file, including all briefs and oral arguments, the court, on December 2, 1994, orally granted both motions. At that time the court informed the parties that a Memorandum and Order setting forth the reasons for its rulings would be forthcoming. Thus, the court is now issuing this Memorandum and Order.

The within cases were consolidated for trial on August 9, 1994. A related case, *Baker, et al. v. FDIC, as Receiver for Hilton Head Bank & Trust Company N.A., et al.*, C/A #9:91-0813-1, is still pending before this court.

FACTS

The facts of these cases in the light most favorable to the

plaintiffs are as follows: Robert E. Young ("Young") is a Texan who at one time was attempting to acquire oil and gas properties. To that end, he incorporated several companies, including the plaintiff company, EDX Holdings, Incorporated ("EDX") and developed a strategic business plan in which he identified a number of properties he wished to purchase. Mr. Young was seeking to acquire financing to enable him to buy several hundred million dollars' worth of properties. He contacted ABN Bank Canada and they suggested that he discuss the matter with Bruce Benn ("Benn"), a lawyer and financier of Corporation House, Ltd. Young contracted with Benn and Benn and Corporation House undertook to advise and represent Mr. Young in his efforts to secure financing Benn's fee for his services was to be $150,000. Benn was paid only $50,000 before the relationship ended.

Benn, a former defendant in this case, arranged a "credit enhancement" transaction. Under this loan plan, Corporation House, through Benn, was to secure letters of credit in Young's or his company's favor through another company, First Pacific Corporation, a Florida corporation operating as a broker of letters of credit. The plaintiffs were to borrow the necessary funds to buy the properties using the letters of credit as collateral. In order to assure that these enhancement letters of credit would not be cashed by the bank to which they were pledged, Benn suggested Young buy a surety bond. The insurance or surety bond would guarantee payment of the loan in case of default, thus preventing resort to the enhancement letter of credit which had been posted as collateral.

To implement this funding, plaintiffs first purchased the suggested surety binder from Swiss-American Fidelity Insurance Company and Guarantee, Ltd. ("SAFIG"). The premium for

this binder was $550,000.[1] Young paid SAFIG for this premium with a letter of credit issued by his bank, Northpark National Bank ("Northpark") of Dallas, Texas. Although SAFIG manager, John Roche ("Roche"), had assured Young that the Northpark letter of credit would be held and not drawn on, SAFIG assigned the letter of credit to First Pacific and First Pacific attempted to cash it. The letter of credit, however, was refused by the bank at which First Pacific's Attilio Francuilli attempted to cash it.

To avoid the cashing of the letter of credit from Northpark, Young obtained a loan from Northpark to substitute for the letter. Northpark wired the proceeds of the loan to HHB&T An Escrow Agreement, prepared by Northpark on Young's behalf, required HHB&T to put the funds in an escrow account until the original Northpark letter of credit was sent back to Northpark to be marked as cancelled and then release the funds to SAFIG. Therefore, once the original letter of credit was returned to Northpark HHB&T turned the $550,000 over to SAFIG pursuant to the Escrow Agreement. After receipt of the premium SAFIG issued a binder for the surety bond.

First Pacific never obtained the letters of credit needed by Young to secure his loan. The SAFIG binder expired and SAFIG refused to return the $550,000 to Young and EDX based on the theory that the funds were earned and that it was Young's and EDX's default that resulted in the failure of First Pacific to obtain the letters of credit.

Young relied on a SAFIG financial statement prepared by

1. SAFIG was owned by Tony Habib and Attillo Francuilli and managed by John Roche. First Pacific was also owned by Habib and Francuilli.

Price Waterhouse Bahamas in his decision to purchase the surety binder. The statement reflected that SAFIG had $12,050,000 on deposit at "a U.S. bank based in South Carolina." To prepare the financial statement, Price Waterhouse Bahamas had sent a "Standard Bank Confirmation" concerning SAFIG's deposits to HHB&T. Mark Feaster ("Feaster"), a commercial loan officer for HHB&T, allegedly signed the document certifying that SAFIG had $12,050,000 on deposit with HHB&T, subject to no restrictions. Additionally, Feaster signed a Trust Deposit Agreement concerning the deposit of the $12,050,000 at HHB&T.[2]

Plaintiffs' first contact with Feaster was after the $550,000 had been turned over to SAFIG pursuant to the Escrow Agreement. In fact, HHB&T's only contact with plaintiffs seems to have been through Northpark, when the $550,000 was wired to the escrow account.

Young never obtained the $55 million funding that he needed to purchase a certain property in which he was interested. He eventually found another buyer for the property and obtained a 2% interest in the deal. Plaintiffs claim that had the $550,000 lost to SAFIG and the $50,000 paid to Benn been available they would have invested it in the land deal and obtained an 8% interest as opposed to the 2% they acquired. This additional 6% in the deal would have resulted in a $3.1 million profit. Robert Young and EDX sued defendants FDIC as receiver for HHB&T, Ruhf and Strickland in an attempt to recover the lost profits and expenses.

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2. Feaster testified that the signature was a forgery, however, Plaintiffs assert that he actually signed the Standard Confirmation as well as other important documents alleged to be forgeries. This court assumed for the purpose of the decision on summary judgment that Feaster had actually signed the "Standard Bank Confirmation" and the "Trust Deposit Agreement" bearing his handwritten name.

Appendix C

LEGAL ANALYSIS

Summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. In reviewing a motion for summary judgment the court must determine whether there exists a genuine issue of material fact. Fed.R.Civ.P. 56.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corporation v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986). Inferences from the facts must be viewed in the light most favorable to the non-moving party. *See Smith v. University of North Carolina*, 632 F.2d 316, 338 (4th Cir. 1980). Though the initial responsibility rests with the moving party, when a motion for summary judgment is made and supported as provided in Rule 56, the non-moving party must produce "specific facts showing that there is a genuine issue for trial," rather than resting upon the bald assertions contained in the pleading. Fed.R.Civ.P. 56(e); *see Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553.

AS TO YOUNG, et al. v. FDIC, C/A #9:89-1398-1

The FDIC moved for summary judgment on the plaintiffs' claim of fraudulent misrepresentation based on the arguments

that defendants had not as a matter of law made a representation on which plaintiffs had a legal right to rely. The FDIC moved for summary judgment on plaintiffs' cause of action for civil conspiracy based on the complete lack of evidence to support the existence of the necessary elements to prove the claim.

Plaintiffs argued in opposition that evidence existed and created a factual issue. No such evidence was proffered, however.

Fraudulent Misrepresentation

The FDIC hotly contested the plaintiffs' assertion that Feaster signed forms representing that "a U.S. bank based in South Carolina" had $12,050,000 on hand. FDIC and, in fact, Feaster, claimed in deposition testimony that the signatures were forgeries. Even assuming that Feaster did fraudulently misrepresent the assets of HHB&T by signing the forms, the plaintiffs must still prove certain elements to recover on a fraud cause of action.

Well established South Carolina law requires that a plaintiff prove, through clear, cogent and convincing evidence, the following nine elements to establish a cause of action for fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. *DeHart v. Dodge City of Spartanburg, Inc.*, __ S.C. __, 427 S.E.2d 720, 722 n. 1 (Ct. App. 1993), and *Moorhead v. First Piedmont Bank & Trust Co.*, 273 S.C. 356, 256 S.E.2d 414, 416 (1979).

Appendix C

In South Carolina,

> "[i]t is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests." Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. Moreover, there is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship, and there is an arm's length transaction between mature educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests.

DeHart, 427 S.E.2d at 722 (citations omitted). A failure to show a right to rely defeats a cause of action for fraud. *Bostick v. Orkin Exterminating Co.*, 806 F.2d 504, 509 (4th Cir. 1986).

Clearly, then, the plaintiffs, as a matter of law, were required to present evidence of the necessary elements of a cause of action for fraud. "The absence of any of these elements from the most favorable view of the plaintiff's case . . . [is] a fatal defect." *Felder v. Great American Ins. Co.*, 260 F. Supp. 575, 577 (D.S.C. 1966).

First, and fatal to their claim, plaintiffs failed to prove that there was any representation made by HHB&T that plaintiffs could have reasonably relied upon to their detriment. The Standard Bank Confirmation received by Price Waterhouse and used in preparing the statement reviewed by Young represented

only that $12,050,000 was deposited on behalf of SAFIG at an unnamed South Carolina bank. The form did not specify HHB&T and in no way guaranteed that the monies would remain at the bank for any length of time. The Trust Deposit Agreement limits withdrawals or encumbrances by providing that the funds "shall not be withdrawn, pledged or otherwise encumbered *up to the dollar equivalent of the insurance guarantees confirmed by the Bank.*" (emphasis added) The court, however, interprets this to mean that the portion of the $12,050,000 not covered by a guarantee confirmed by the bank *could have been* withdrawn.[3] Therefore, pursuant to the terms of the agreement the monies did not have to remain in the bank.

The forms presented by plaintiffs as proof clearly show that the $12,050,000 could have been put in HHB&T one day and taken out the next. The documents did not purport to do what Young wished them to do; i.e., guarantee the safety of his venture. As a experienced businessman, Young had no justifiable reason to rely on such representations.

Second, Young did not have the necessary fiduciary relationship to even form a right to rely on the representations. This was an arms length transaction between educated people. Young never dealt directly with HHB&T or Feaster. The only contact between the two was when Northpark wired the $550,000 to HHB&T. Young never had an account or *any* relationship with HHB&T. Young attempted to prove a right to rely on representations made to others, i.e., secondhand knowledge. There is no evidence, however, that he ever contacted HHB&T directly for written confirmation concerning

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3. There was no evidence that HHB&T ever confirmed *any* SAFIG guarantees.

these activities. As a sophisticated businessman, with no relationship to HHB&T, Young had no right to rely on secondhand knowledge.

Third, a plaintiff may not claim fraud and misrepresentation in the contents of documents if the truth could have been ascertained by reading the documents. *Burwell v. South Carolina National Bank*, 288 S.C. 34, 340 S.E.2d 786, 789 (1986). If Young had read the Escrow Agreement and Trust Deposit Agreement, he would have known that the monies did not have to remain in the bank. SAFIG'S financial stability was only good so long as the $12,050,000 in an unnamed bank existed. Young should have used precaution and protected his interests.

Because plaintiffs failed to show any representation upon which they had a right to rely, and also failed to show evidence of the fiduciary relationship with HHB&T necessary to form a right to rely, the court finds that, as a matter of law, the elements to establish fraud have not been met and the defendants are entitled to summary judgment on this cause of action.

Civil Conspiracy

Applying South Carolina law, this court finds that the plaintiffs must prove three elements in order to establish a claim for civil conspiracy. The elements are: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage. *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988).

To prove their conspiracy claim, the plaintiffs must present evidence to show that Feaster conspired with others at HHB&T to defraud plaintiffs. "[T]o establish a conspiracy, evidence, direct

or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris,* 292 S.C. 595, 358 S.E.2d 150, 153 (Ct. App. 1987). While "[p]roof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of alleged conspirators is sufficient; at least to establish a prima facie case of conspiracy", plaintiffs failed to present such evidence. *Id.* There was, in fact, no evidence that Feaster ever conspired with anyone. More than a "scintilla of evidence" is required to support plaintiffs' position on summary judgment. *Catawba Indian Tribe v. South Carolina,* 978 F.2d 1334, 1339 (4th Cir. 1992); cert. den., 113 S. Ct. 1415, 122 L. Ed. 2d 785 (1993).

Additionally, the plaintiffs must show special damage caused as a result of the conspiracy. It is not enough to simply list the damages resulting from other torts upon which the case relies. See *Vaught v. Waites,* 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989) (The South Carolina Court of Appeals held that failure to allege special damages aside from the damages alleged in a breach of contract action barred a conspiracy action.) The plaintiffs failed to present such evidence in this case.

Thus, as a matter of law, plaintiffs have failed present evidence to meet the elements necessary to prove civil conspiracy and the defendants are entitled to summary judgment on this cause of action.

AS TO YOUNG, et al. v. JONES, et al., C/A #9:92-0308-1

Tom Ruhf and George Strickland are before the court on a

cause of action for negligent supervision. They moved for summary judgment based on the lack of evidence presented by the plaintiffs as to a breach of duty and a failure on the part of plaintiffs to file suit within the applicable statute of limitations. Plaintiffs argued that HHB&T employee Mark Feaster was engaged in certain fraudulent actions and that these actions could not have occurred but for the negligent supervision of his superiors.

Negligent supervision

In South Carolina, "[t]o prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. If the plaintiff fails to prove any of these elements, the action will fail." *Newton v. South Carolina Pub. Rys. Comm'n.*, __ S.C. __, 439 S.E.2d 285, 287 (Ct. App. 1993) (citations ommited).

As a general rule, officers and directors of a bank owe no duty to third parties with whom it transacts business. Any such cause of action would lie against the bank and not its individual officers and directors. *Daniels v. Berry*, 148 S.C. 446, 146 S.E. 420, 422 (1929); *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643, 644 (1980). This legal theory is the same as that which protects individuals who transact business as a corporation. Therefore, to "pierce the corporate veil" of the bank and hold the individual officers and directors liable, the plaintiff must show fraud or "extreme negligence." *Daniels* 146 S.E. at 423-24.

Additionally, in *Virginia-Carolina Chemical Co. v. Ehrich*,

230 F. 1005 (D.S.C. 1916), this court ruled that a person dealing with a corporation may recover in negligence against the officers and directors of a bank, if he proves that: (1) The plaintiff dealt directly with the bank; (2) The plaintiff reasonably relied on the faithful discharge of the duties of the directors; (3) The officers and directors actively participated in the tortious conduct or could have in the exercise of ordinary and reasonable supervision, detected and prevented the wrongdoing of the subordinate officers; (4) The directors and officers did not fulfill their duties; and, (5) Plaintiff's injury was caused by the director's or officer's failure to discharge those duties.

To prevail, therefore, the plaintiffs need to show some evidence to prove that Ruhf and Strickland first, owed a duty of care as individuals and, second, breached that duty. In viewing the facts in the light most favorable to the plaintiffs, the court must assume that Feaster actually signed the Standard Bank Confirmation and Trust Deposit Agreement heretofore mentioned, which contained erroneous information. Therefore, there was some fraud on the part of Feaster. This fraud would serve to pierce the corporate veil and impose a "duty" or make Ruhf and Strickland individually responsible. The plaintiffs are then required to prove a breach of the duty by showing that Ruhf and Strickland had engaged in some tortious activity with Feaster or that they could have in some way detected and prevented Feaster's activities by exercising reasonable supervision.[4]

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4. By Order of May 2, 1994, this court, on reconsideration of its February 17, 1994 Order, granted summary judgment to all remaining defendants except Ruhf and Strickland. Ruhf and Strickland remained in the case because they conceded that plaintiffs had stated a cause of action against them. At this juncture, after extensive discovery, the court now

(Cont'd)

Appendix C

Plaintiffs do not argue that defendants engaged in any tortious activity with Feaster and have presented no evidence of a breach of duty. The only alleged tortious acts committed prior to September 23, 1988 (the date the $550,000 was turned over to SAFIG pursuant to the Escrow Agreement) were Feaster's signing of the Trust Agreement and his signing of the Standard Bank Confirmation. Other than an assertion by Young that he "believed" that Ruhf and Strickland were aware of this fraud, plaintiffs presented no evidence to show that the defendants had any reason to believe that Feaster might have certified such erroneous information.[5]

Even if plaintiffs were able to prove that Feaster signed the documents or otherwise gave fraudulent information, they cannot succeed. Feaster exceeded the scope of his authority and provided information he knew to be false by signing the Standard Bank Confirmation and the Trust Deposit Agreement, thus committing an intentional tort. Under the Restatement of Torts Rule, adopted by the South Carolina Supreme Court in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495, 496 (1992) and the Court of Appeals in *Brockington v. Pee Dee Mental Health Ctr.*, __ S.C. __, 433 S.E.2d 16, 18

(Cont'd)
considers the evidence that has been presented to determine if an issue of material fact exists. As previously mentioned, in a motion for summary judgment the moving party bears the initial responsibility of informing the court and identifying evidence which it believes demonstrates the absence of a genuine issue of material fact. When the moving-party has presented its evidence, then the burden shifts to the non-moving party to show a genuine issue for trial.

5. In fact, the only evidence introduced was introduced by defendants and showed that Feaster was a hard worker for HHB&T, reported frequently on all his projects to his superiors, and showed no propensity for fraudulent behavior.

(Ct. App. 1993), an employer in South Carolina may be liable for negligent supervision if the employer knew or should have known of the necessity and opportunity for exercising control over an employee engaged in tortious conduct. As previously discussed, plaintiffs presented no evidence to prove that either of these defendants had any reason to suspect that any control over Feaster was necessary.

Statute of Limitations

In addition, defendants Ruhf and Strickland argued the failure of plaintiffs to file this suit within the time allowed by the applicable statute of limitations. While this argument is not necessary for Ruhf and Strickland to prevail on summary judgment, this court does find that the action does not comply with the applicable statute of limitations.

The suit was commenced on January 31, 1992. According to South Carolina Code § 15-3-535 (Supp. 1993), the appropriate limitations period for a tort is three years from the time "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." Defendants introduced evidence from the personal journals of Young that proved that plaintiffs knew of their injury on January 25, 1989. The journal, an extensive record of Young's business days, shows that on the days preceding January 25, 1989, Benn called Young frequently to discuss problems with the deposit at HHB&T. Benn's assistant called Young and spoke of the "problem with Feaster." On January 25, 1989 Young telephoned Benn and Benn advised that he had "talked to Strickland [and] it will get done. They know they have liability to fund SAFIG's L.C." On January 26, 1989 Young wrote that he had "talked to Feaster, Roche & Strickland — They know they are in deep s---."

Appendix C

Young's cause of action accrued when his injury occurred on September 24, 1988, when HHB&T wired the funds to SAFIG in compliance with the Escrow Agreement. On that date, the funds were no longer available at HHB&T. According to Young's records, he was aware of the problem by January 22, 1989. His awareness is reflected in journal entries on that date and on January 24, 25, and 26, 1989. By January 31, 1989, exactly three years before this suit was brought, Young was on notice that he had been injured, and reasonable diligence on his part should have put him on notice that HHB&T or its officers and directors might be liable.

In conclusion, plaintiffs fail to present evidence sufficient, as a matter of law, to prove the elements necessary to establish a cause of action for negligent supervision, and defendants are entitled to summary judgment on this cause of action.

THEREFORE, it is

ORDERED, that the motion for summary judgment of defendant FDIC, filed November 10, 1994, in Civil Action #9:89-1398-1, be, and the same is hereby, **GRANTED.** It is

ORDERED FURTHER, that the motion for summary judgment of defendants Ruhf and Strickland, filed November 14, 1994, in Civil Action #9:92-0308-1, be, and the same is hereby, **GRANTED.**

AND IT IS SO ORDERED.

s/ Falcon B. Hawkins
Falcon B. Hawkins
United States District Judge

Charleston, S.C.

December 8, 1994.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, BEAUFORT DIVISION FILED MAY 3, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CIVIL ACTION #9:89-1398-1

Robert H. Young and EDX Holdings,

Plaintiffs,

v.

The Federal Deposit Insurance Corporation, as receiver for Hilton Head Bank & Trust Company, N.A.; First Pacific Corporation; John Roche; Swiss-American Fidelity Insurance Company and Guarantee, Ltd.; Attilio Francuilli; Tony Habib; Bruce Benn and Corporation House, Ltd.,

Defendants.

ORDER

This matter is before the court on the motion of Defendant Federal Deposit Insurance Corporation (FDIC) for reconsideration of this court's September 28, 1993, order, in which the court granted in part and denied in part the FDIC's motion for summary judgment. In the alternative, the FDIC requests that the court certify its September 28, 1993, order under 28 U.S.C. § 1292(b), which allows a district judge, who is of the opinion that his order involves a controlling question of law as to which there is substantial ground for difference of opinion, to allow immediate appeal of the interlocutory order if

it would materially advance the ultimate termination of litigation. The FDIC's motion for reconsideration was filed October 14, 1993. Plaintiffs have filed opposition.

On September 28, 1993, this court denied the FDIC's motion for summary judgment on the Plaintiffs' fraudulent misrepresentation and South Carolina Unfair Trade Practices Act claims. The court has reviewed the FDIC's arguments in support of its motion for summary judgment on the fraudulent misrepresentation claim. The thrust of FDIC's argument is that the *D'Oench*[1] doctrine shields the FDIC from claims for fraud.

In denying the FDIC's motion for summary Judgment on the fraudulent misrepresentation claim, this court held that the *D'Oench* doctrine is not a defense to a tort action against the FDIC, in its capacity as a receiver of a failed bank, resulting from the fraudulent misrepresentation of one of the bank's officers, if the misrepresentation is a free-standing tort unrelated to an asset of the bank.

Plaintiffs alleged that Mark Feaster, a bank officer, signed a form that was used as the basis for an audited financial statement prepared by a Bahamian accounting firm. The completed form indicated that another Defendant, SAFIG, had liquid assets of $12.5 million dollars on deposit at an unnamed South Carolina Bank. Plaintiffs allege that they relied to their detriment on the erroneous audited financial statement. Further, Plaintiffs contend that but for Feaster's signature on the form, indicating that the bank actually held the assets of SAFIG, the fraudulent financial statement would not have been confirmed by the accountants. Thus, Plaintiffs would not have relied on the statement or have been damaged thereby.

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1. *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676 (1942).

Appendix D

The misrepresentation by Feaster, taken as true, is a tort not based on a unrecorded agreement or an action in contract based on an unwritten term of the agreement. Under the *D'Oench* doctrine an unwritten or secret agreement, or an oral promise, not documented in the records of a banking institution, cannot be used to defeat an action or support an action against the FDIC, as receiver for a bank. The *D'Oench* Court stated that when a party lent himself to a scheme or arrangement by which the banking authorities were likely to be deceived, such scheme or arrangement could not be used as the basis for a defense against the FDIC. *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 at 460, 62 S.Ct. 676 at 681; *Langley v. FDIC*, 484 U.S. 86, 93, 108 S.Ct. 396, 402 (1987).

This court found that there was no evidence presented on summary judgment that the Plaintiffs had lent themselves to a scheme or arrangement in order to deceive the banking authorities. Further, in reliance upon *Vernon v. Federal Deposit Ins. Corp.*, 981 F.2d 1230 (11th Cir. 1993), this court found that the *D'Oench* doctrine did not shield the FDIC from the Plaintiffs' claim of fraudulent misrepresentation by one the bank's officers, when the misrepresentation is a free-standing tort unrelated to an asset of the bank. *See also, OPS Shopping Center. Inc. v. Federal Deposit Ins. Corp.*, 992 F.2d 306 (11th Cir. 1993) (discussing *Vernon*); *Jones v. Resolution Trust Corp.*, 7 F.3d 1006, 1015 (11th Cir. 1993); *Commerce Federal Sav. Bank v. FDIC*, 872 F.2d 1240, 1244 (6th Cir. 1989) (12 U.S.C. § 1823(e) statutory prohibition of use of an unrecorded agreement to diminish asset of bank, not applicable if no assets involved); *Abrams v. RTC*, 1993 U.S. Dist. LEXIS 15691 (N.D. Ill. Nov. 5, 1993) (court opined that *D'Oench* should not bar free standing tort claims).

Appendix D

FDIC argues that this court's findings in reliance upon the *Vernon II* and *OPS Shopping Center* cases is misplaced because it is contrary to persuasive authority in cases from the First, Fifth,[2] Sixth and Eighth[3] Circuits. *See, Timberland Design, Inc. v. First Service Bank for Savings,* 932 F.2d 46, 49-50 (1st Cir. 1991); *Jackson v. FDIC,* 981 F.2d 730 (5th Cir. 1992); *Bell & Murphy & Assoc., Inc. v. Interfirst Bank Gateway. N.A.,* 894 F.2d 750, 753 (5th Cir.) *cert. denied,* 498 U.S. 895 (1990); *Bowen v. FDIC,* 915 F.2d 1013, 1016 (5th Cir. 1990); *First State Bank v. City and County Bank,* 872 F.2d 707, 716-717 (6th Cir. 1989); *North Arkansas Medical Center v. Barrett,* 962 F.2d 780, 788-89 (8th Cir. 1992). Accord, *Hill v. Samuel Cabot, Inc.,* 1993 U.S. Dist. LEXIS 12242 (D.Mass. August 26, 1993) (court up held use of *D'Oench* to bar misrepresentation claim). However, this court finds the holdings of the authorities cited by the FDIC to be inapposite.

Three of the cases cited by the FDIC were for lender-liability claims. *See e.g., Timberland Design v. First Service Bank for Savings, Jackson v. FDIC* and *Bowen v. FDIC.* These cases raised questions as to the use of the *D'Oench* doctrine to shield the FDIC from affirmative claims based upon the failed bank's alleged undocumented promises to lend future sums. In *Bowen*

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2. *Cf. Thigpen v. Sparks,* 983 F.2d 644 (5th Cir. 1993) (court held that *D'Oench* not a bar to breach of warranty claim arising from the purchase of a trust co. from bank.)

3. *Cf. Astrup v. Midwest Fed. Savings Bank,* 886 F.2d 1057, 1059 (8th Cir. 1989) (held that application of *D'Oench* doctrine to actions sounding wholly in tort would be an extension of the doctrine); *Hanson v. FDIC,* 1194 U.S. App. LEXIS 476 (8th Cir. January 13, 1994) (the appellate court found that a party may maintain a claim based on a tort wholly independent of an agreement).

v. FDIC, a bank officer made an oral promise to the Bowens that the bank would loan them the money to pay delinquent payroll taxes. When the delinquency was noticed by the IRS, the same bank officer told the Bowens that the bank would not make the loan. This unwritten promise was the basis of the Bowens' suit against the bank. The appellate court found that the application of the *D'Oench* doctrine prevented the Bowens from asserting the bank's unrecorded promise to loan them money as the basis for a claim against the FDIC, and that the Bowens had lent themselves to an arrangement that had the tendency to deceive the banking authorities, even though the court found no malfeasance on the part of the Bowens. Similarly in *Timberland Design*, the plaintiff alleged that the bank had made an oral agreement to loan Timberland a substantial sum in the future. Likewise in *Jackson*, the plaintiff's claim was based on the bank's failure to lend him money to purchase stock.

The issue raised in *North Arkansas Medical Center v. Barrett*, 962 F.2d 780, 788-89 (8th Cir. 1992), was a question of the applicability of 12 U.S.C. § 1823(e), which is a partial codification of the *D'Oench* doctrine under the Financial Institutions Reform, Recovery and Enforcement Act, popularly known as FIRREA. The requirements of § 1823(e) are more rigorous than the common law *D'Oench* doctrine. The plaintiff in *North Arkansas Medical Center* had made deposits in a savings institution in excess of the FSLIC deposit insurance coverage. The institution, which later failed, had arranged with the depositor for the savings institution to put up collateral to secure the amount of the deposits. The district court found that the security agreement did not indicate that it had been approved by the board of directors or a loan committee, and such approval is one of the particularized requirements of 12 U.S.C. § 1823(e).

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To the contrary, this court has found that in addition to the Eleventh Circuit support in *Vernon I, Vernon II* and *OPS Shopping Center*, the *Vernon I* court's interpretation of the limitation of the *D'Oench* doctrine was cited with approval in an Eastern District of North Carolina case, *First Financial Savings Bank v. American Bankers Ins.* 783 F.Supp. 963, 967 (E.D.N.C. 1991).

Nonetheless, the cases followed by the court and those cited in rebuttal by the FDIC fairly demonstrate that the legal question at issue is one for which there is substantial ground for difference of opinion. This court has found no reported decision by the Fourth Circuit Court of Appeals on the precise issue raised by the facts before the court. Therefore, although upon reconsideration the court is not convinced that its decision was erroneous, because there is a substantial ground for a difference of opinion on this question of law, the court will certify this issue for interlocutory appeal, which should materially advance the ultimate termination of this litigation against the FDIC.

The FDIC also complains of the court's denial of the FDIC's motion for summary judgment on the South Carolina Unfair Trade Practices Act (SCUTPA) claim. The court denied the claim because the FDIC did not present a cogent legal argument supporting its position such that the court could grant summary judgment under the appropriate standard of review.

In the FDIC's brief in support of the Motion for Summary Judgment, the FDIC's only argument on the issue of Plaintiffs' SCUTPA claim was that the banking transaction in question was exempt from coverage by the deceptive trade practices Act pursuant to S.C.Code Ann. § 39-5-40. FDIC relied on *North Carolina National Bank v. Tiller*, 814 F.2d 931 (4th Cir. 1987).

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FDIC's Memo. in Support of Motion For Summary Judgment, Sept. 18, 1992, pp. 27-28. However, at oral argument, the FDIC conceded that the "general activity" test espoused in *NCNB v. Tiller* had been rejected by the South Carolina Supreme Court in *Ward v. Dick Dyer & Assoc. Inc.*, 403 S.E.2d 310 (S.C. 1991).[4]

Contrary to Plaintiffs' interpretation of events, the FDIC did not stipulate that the SCUTPA exemption does not apply to the facts presented herein. The FDIC simply conceded that the "general activity test" had been put to rest by the South Carolina Supreme Court, and abandoned its argument based on that test that the exemption language was applicable. Instead the FDIC relied without explanation on the *D'Oench* doctrine to prevent a finding of liability against the FDIC on the SCUTPA claim.

A party seeking summary judgment hears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence

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4. In its Sept. 29, 1993, order on the FDIC's Motion for Summary Judgment, the court stated "... at oral argument, the FDIC conceded its argument that it fell within the exemption of SCUTPA." The sentence has apparently caused some confusion. The sentence is not a finding that the FDIC conceded the issue of whether it fell within the exemption available under S.C.Code Ann. § 39-5-40. The court stated that the FDIC conceded, or abandoned, its argument that it fell within the exemption provision of SCUTPA, when the FDIC conceded that the "general activity" test espoused in *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931 (4th Cir. 1987), had been overruled by implication in *Ward v. Dick Dyer & Assoc., Inc.*, 403 S.E.2d 310 (S.C. 1991).

of genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986). The FDTC merely brandished the *D'Oench* doctrine and made no substantial attempt to convince the court that summary judgment was appropriate. The court is not required to find for itself the facts that support movant's argument for summary judgment; therefore, the court denied the motion on that issue leaving the matter to be resolved at trial.

In requesting reconsideration, the FDIC undertakes to clarify its position on the applicability of the exemption section of SCUTPA and the *D'Oench* doctrine to the case at bar. The failure to honor the letter of credit is the only action alleged that could reasonably be construed as a trade practice of Hilton Head Bank & Trust. Neither the letter of credit nor any document confirming the letter of credit has been found in the bank's records. The court has already found that the document, which Plaintiffs claim would prove that Feaster confirmed the letter of credit after the payment of the funds pursuant to an escrow agreement, is not a document from the bank's records. Therefore, the FDIC asserts that the *D'Oench* doctrine and 12 U.S.C. § 1823(e) require the court to grant summary judgment in favor of the FDIC as to the SCUTPA claim.

Plaintiffs argue in rebuttal that all the allegations in the subsections listed under ¶ 82, and "elsewhere," in the Complaint, support Plaintiffs' SCUTPA claim. *See*, Plaintiffs' Mem. in Opposition to Defendant FDIC's Motion to Reconsider, Nov. 9, 1993, p. 8. However, the only allegation under ¶ 82 of the Complaint that could be directed at the bank's actions as an unfair or deceptive trade practice is ¶ 82(g). Paragraph 82(g) states only that the Defendants caused the SAFIG letter of credit to be dishonored when delivered to HHB&T for payment.

Appendix D

Plaintiffs may not rest on their bare allegations to rebut a motion for summary judgment, but must put forth credible factual evidence. When a motion for summary judgment is made and supported as provided in Rule 56, the non-moving party must produce "specific facts showing that there is a genuine issue for trial," rather than resting upon the bald assertions contained in the pleadings. Fed.R.Civ.P. 56(e); *See Celotex*, 477 U.S. at 327.

According to Plaintiffs, HHB&T wrongfully dishonored a letter of credit issued by SAFIG. The SAFIG letter of credit named Plaintiff Young as the account party and North Park National Bank as the beneficiary. Under South Carolina Code § 36-5-107(2), a bank only becomes obligated on a credit issued by another bank if it confirms the credit. Plaintiffs have failed to substantiate their allegations that HHB&T confirmed the funds for payment of the letter of credit with any documentation that was contained in the bank's records.

The alleged actions of confirmation taken by Mark Feaster, as an employee of the bank, are allegations of acts of fraud and misrepresentation directed only at the Plaintiffs. The evidence that other bank employees made directly contradictory assertions to Young that SAFIG had no funds with which to pay the letter of credit. stands in stark contrast to the alleged solitary actions of Feaster. The individualized actions of Feaster cannot reasonably be said to evince a course of conduct by the bank that would have an impact on the public or the people of South Carolina, or to evince a potential for repetition, as required to fall within the unfair trade practices statutory scheme.

The facts which support the fraudulent misrepresentation claim do not support a SCUTPA claim, because there is simply

no evidence that Feaster's actions are indicative of a regular bank practice of deceit. Whether an act constitutes an unfair trade practice is a matter of law for the courts to decide. *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 363 S.E.2d 691 (S.C. 1988).

To fall within the South Carolina statute, the alleged actions must have some impact on the public interest. *Barnes v. Jones Chevrolet*, 358 S.E.2d 156, 159 (S.C. Ct. App. 1987) *citing Noack Enterprises. Inc. v. Country Corners Interiors of Hilton Head Island*, 351 S.E.2d 347 (S.C. Ct. App. 1986). It is indisputable that the misrepresentation was the act of one person directed solely at the Plaintiffs. Twice when Young contacted the bank, a bank employee other than Feaster, informed Young that SAFIG did not have funds to pay a draft on the letter of credit. In complete contradiction to that which Young had already learned from the bank for himself, Feaster would then contact Young directly and tell Young that SAFIG funds were available.

Plaintiffs' allegations that HHB&T violated the state unfair trade practices act by wrongfully failing to pay the letter of credit, cannot overcome the requirements of the *D'Oench* doctrine or 12 U.S.C. § 1823(e). Earlier in this litigation, Plaintiffs alleged sufficient facts to show that HHB&T was a confirming bank to overcome the bank's motion to dismiss on the pleadings. The case has since gone forward with discovery and HHB&T has been placed into receivership. The FDIC, as receiver for the failed bank, has been substituted as a defendant for HHB&T in this action. As receiver, the FDIC enjoys defenses that were unavailable to HHB&T and the same evidence used to overcome the motion to dismiss does not create a genuine issue of material fact for purposes of a motion for summary judgment.

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Plaintiffs have a letter dated January 9, 1989, purportedly signed by Mark Feaster, an HHB&T vice president. The letter says that it "hereby acknowledge[s] receipt and confirmation of the attached documentation." There is no evidence of any documents attached. There is also an unsigned letter, which appears to be on HHB&T letterhead, that states that it will "confirm [the] Letter of Credit #088 in the amount of $550,000.00. . . ." An FDIC officer has attested that neither of these letters have been found in the bank's records and the plaintiffs have been unable to refute the officer's affidavit. These two letters, which contradict the bank's records, cannot be used against the FDIC, as receiver, as the basis for a claim that the bank was a confirming bank and as confirming bank wrongfully dishonored the letter of credit in violation of the South Carolina Unfair Trade Practices Act. As a result there is no evidence to support a wrongful dishonor action that could be characterized as an unfair trade practice.

However, even if the FDIC could not shield itself from use of the two documents that Plaintiffs' offer to show that HHB&T was a confirming bank, the bank's records indicate that there were insufficient funds on deposit with which to pay the draft at the time the demand was made; therefore, the document was not properly payable. A payor bank is not liable for the amount of a documentary draft, even if it fails to return the draft in the time allowed by S.C.Code Ann. § 36-4-302, because if there are no funds available to honor the draft, the document is not properly payable. *South Carolina Nat'l Bank v. First Union Nat. Bank*, 427 S.E.2d 169 (S.C. 1993). For this reason, there was no wrongful dishonor; the bank was not obligated to honor the letter of credit issued by another bank because the document was not properly payable. The dishonor was in accordance with sound banking practice, therefore not an unfair trade practice.

Appendix D

For the reasons herein above stated, the FDIC's motion for reconsideration is granted. Upon reconsideration, the court also finds that the FDIC's motion for summary judgment on the Plaintiffs' SCUTPA claim should be granted. Furthermore, the question of whether the *D'Oench* doctrine provides the FDIC, as receiver for a failed banking institution, with a complete defense to a tort claim that is not based on any undocumented agreement with the bank or any asset acquired by the FDIC, is certified for interlocutory appeal to the Fourth Circuit Court of Appeals.

Finally, the court also reconsiders its grant of summary judgment to the FDIC on Plaintiffs' civil conspiracy claim for the same reasons herein above discussed with regard to the application of the *D'Oench* doctrine. Upon reflection, the court is not convinced that its reasoning that a civil conspiracy to defraud should fall under the axe of the *D'Oench* doctrine, or 12 U.S.C. § 1823(e), simply because it involves an undocumented agreement. As stated in *Jones v. RTC,* 7 F.3d 1006 at 1015 (11th Cir. 1993), "[n]o one is likely to memorialize an agreement or intention to commit a tort."

Therefore, the court withdraws the portion of its September 30, 1993, order granting the FDIC's request for summary judgment on the civil conspiracy claim, and hereby denies the requested relief. Further, the court certifies the issue of whether a civil conspiracy claim is futile against the FDIC because of the *D'Oench* defense, on the same basis as stated above with regard to the fraudulent misrepresentation cause of action. Further the court finds that the interlocutory appeal of whether the *D'Oench* doctrine defeats a civil conspiracy claim asserted against the FDIC, as receiver, because it is based on an undocumented agreement, would materially advance this

litigation. Accordingly,

IT IS ORDERED that the FDIC's motion for reconsideration is granted.

IT IS FURTHER ORDERED that summary judgment is granted for the FDIC on Plaintiff's unfair trade practices claim.

IT IS FURTHER ORDERED that Court's order of September 28, 1993, granting summary judgment for Defendant FDIC on Plaintiffs' claim for civil conspiracy, is hereby amended to deny summary judgment for the FDIC on the civil conspiracy claim and to certify for interlocutory appeal the question of whether the *D'Oench* doctrine bars a civil conspiracy claim because it is based on an unwritten agreement and is amended to certify the question of whether the *D'Oench* doctrine bars a free standing tort claim against the FDIC, as receiver.

IT IS SO ORDERED.

s/ Falcon B. Hawkins
Falcon B. Hawkins,
United States District Judge

Charleston, South Carolina
May 2nd 1994

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, BEAUFORT DIVISION FILED SEPTEMBER 29, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CIVIL ACTION #9:89-1398-1

Robert H. Young and EDX Holdings,

Plaintiffs,

vs.

The Federal Deposit Insurance Corporation, as receiver for Hilton Head Bank & Trust Company, N A.; First Pacific Corporation; John Roche; Swiss-American Fidelity Insurance Company and Guarantee, Ltd.; Attilio Francuilli; Tony Habib; Bruce Benn and Corporation House, Ltd.,

Defendants.

ORDER

This matter is before the court on the Federal Deposit Insurance Corporation's Motion for Summary Judgment, filed September 18, 1992. The Federal Deposit Insurance Corporation (FDIC) is acting as receiver for Hilton Head Bank and Trust (HHB&T), which was a federally insured banking institution that was declared insolvent after the initiation of this suit. The Plaintiffs oppose the motion.

Appendix E

The underlying action arises from a failed investment scheme. Plaintiffs, Robert H. Young, an individual, and EDX Holdings, Incorporated, a corporation for which Young serves as president and chief executive officer, assert that they were swindled by Defendants.

The FDIC asserts that summary judgment is appropriate for those causes of action alleged against it, specifically: fraud, unfair trade practices, civil conspiracy, and wrongful dishonor. Summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. In reviewing a motion for summary judgment the court must determine whether there exists a genuine issue of material fact. Fed.R.Civ.P. 56.

> Of course a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of genuine issue of material fact.

Celotex Corporation v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986). Inferences from the facts must be viewed in the light most favorable to the nonmoving party. *See Smith v. University of North Carolina*, 632 F.2d 316, 338 (4th Cir. 1980). Though the initial responsibility rests with the moving party, when a motion for summary judgment is made and supported as provided in Rule 56, the non-moving party must produce "specific facts showing

that there is a genuine issue for trial," rather than resting upon the bald assertion contained in the pleadings. Fed.R.Civ.P. 56(e); *See Celotex*, 477 U.S. at 327.

The FDIC contends that although Mark Feaster, an employee of the failed bank, may have made alleged oral and written misrepresentations, upon which Plaintiffs relied to their detriment, the defenses available to the FDIC as receiver for the failed bank preclude a finding of liability against the FDIC. According to the FDIC, regardless of any liability the bank may have had for the misrepresentations of its employees, the FDIC as receiver, is protected by statutory law and judicial precedent. Furthermore, FDIC argues that Plaintiffs cannot show a fiduciary relationship between the FDIC and the plaintiffs; therefore, there can be no finding of fraud against the FDIC.

Plaintiffs allege that Feaster signed a form, which was used as the basis for an audited financial statement prepared by a Bahamian accounting firm. The form when completed indicated that another Defendant, SAFIG, had liquid assets of $12.5 million dollars on deposit at a South Carolina Bank. Plaintiffs allege that they relied to their detriment on the audited financial statement that erroneously affirmed that a South Carolina bank held a deposit of more that twelve million in it on behalf of Defendant SAFIG. Plaintiffs allege that had Feaster not signed the form indicating the bank held a deposit on behalf of SAFIG, the fraudulent financial statement would not have been affirmed by the accountants, and Plaintiffs would not have been damaged by their detrimental reliance upon it.

FDIC argues that the doctrine of *D'Oench Duhme & Co.v. FDIC*, 315 U.S. 447, 62 S.Ct. 676 (1942), bars a finding of fraud against the FDIC as receiver. Under the *D'Oench* doctrine,

an unwritten or secret agreement, or an oral promise, not documented in the records of a banking institution, cannot be used to defeat an action by or support an action against the FDIC. The misrepresentation by Feaster, taken as true, is a tort not based on a breached agreement or an action in contract based on an unwritten term of the agreement. The cause of action alleged by Plaintiffs is fraudulent misrepresentation unrelated to any note or asset of the bank upon which the banking authorities would have relied. There is no evidence that Plaintiffs lent themselves to a scheme or arrangement whereby the banking authorities would be deceived. *Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396 (1987). The *D'Oench* doctrine is not a defense to a tort action resulting from the fraudulent misrepresentation of one the bank's officers, if the misrepresentation is a free-standing tort unrelated to an asset of the bank. *Vernon v. Federal Deposit Ins. Corp.*, 981 F.2d 1230 (11th Cir. 1993). See also, *OPS Shopping Center. Inc. v. Federal Deposit Ins. Corp.*, 992 F.2d 306 (11th Cir. 1993) (discussing *Vernon*); *In re Longhorn Secur. Litigation*, 573 F.Supp. 278 (W.D. Okla. 1983).

FDIC further argues that any alleged fraudulent conduct by Feaster is irrelevant with respect to the FDIC, as receiver. In reliance upon case law that merely states that substantial rights of the bank have changed as a direct consequence of the receivership, the FDIC asserts that there is no fiduciary relationship between the FDIC and the Plaintiffs; therefore, the FDIC has no liability for fraud. See *Florentine Corp. v. Peda I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985). The FDIC offers no case law suggesting that, by virtue of its position of as receiver of a failed bank, the FDIC has no fiduciary duty to parties to whom the bank may have had a fiduciary duty.

Appendix E

The FDIC has failed to show that the Plaintiffs' fraud claim for Feaster's alleged malfeasance, resulting from the Plaintiffs' reliance on an audited financial statement, is properly resolved by summary judgment.

The FDIC also argues that the *D'Oench* doctrine is applicable to Plaintiffs' claim for Feaster's fraudulent confirmation of the existence of the SAFIG letter of credit. This argument has merit. The escrow agreement signed by George Strickland, an officer of HHB&T, shows that HHB&T agreed to hold the sum of $550,000 on behalf of a Dallas bank, until: SAFIG assigned the letter of credit to HHB&T; HHB&T telecopied a copy of the letter of credit to the Dallas bank; the Dallas bank telecopied a request to HHB&T that the letter of credit be voided; HHB&T voided the letter of credit and sent it by Federal Express to the Dallas bank, and; finally, HHB&T was authorized to release the funds to SAFIG.

FDIC claims that the conditions for release of the funds were completed, and pursuant to the escrow agreement the bank released the funds to SAFIG. FDIC Motion for Summary Judgment ¶ 26, p. 7. Plaintiffs do not attempt to refute this allegation. The document plainly states that the funds should be released to SAFIG once the conditions precedent had occurred. The *D'Oench* doctrine would apply to the escrow agreement thus any oral modification, or other representation not in the bank's records, will not defeat the FDIC to find any fraud in the payment of the funds to SAFIG. Accordingly, the allegations of fraud as they may relate to the payment of the funds to SAFIG must fail to FDIC's motion for summary judgment.

Similarly, the Plaintiffs' action for civil conspiracy must

fail. A conspiracy requires an agreement among parties to the conspiracy. Plaintiffs cannot show that there is any record of agreement between the bank and another defendant to swindle the Plaintiffs. The *D'Oench* doctrine has been interpreted to preclude the Plaintiffs reliance on any secret agreement to support an action against the bank. The motion for summary judgment on the cause of action for civil conspiracy should be granted.

The FDIC has further moved for summary judgment on Plaintiffs' allegations of unfair trade practices pursuant to the South Carolina Unfair Trade Practices Act (SCUTPA). S.C. Code Ann. § 39-5-10 *et seq.* Section 39-5-40 provides that the Act does not apply to actions or transactions permitted under laws administered by a regulatory body or officer acting under authority of the laws of the State of South Carolina or the United States.

In *Ward v. Dick Dyer & Assoc., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (S.C. 1991), the South Carolina Supreme Court explained that the exemption is meant to ensure that a business is not subjected to liability under the Act when it does something required by law, which would otherwise be a violation of the Act. The FDIC argued in its memorandum in support of its motion that because the banking industry is regulated by other law, it is not subject to the provisions of SCUTPA. Plaintiffs countered that the banking industry does not fall within the exception contemplated by § 39-5-40.

The actions of the FDIC are heavily regulated by federal law, e.g. the FDIC has broad authority to resolve claims made against failed banking institutions. Though the *Ward* opinion does suggest that the "general activity" test, espoused by the

Fourth Circuit Court of Appeals in *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931 (4th Cir. 1987), is not the standard for determining whether an industry falls within the SCUTPA exemption, nothing in the *Ward* opinion would suggest that the FDIC, a federal agency governed by federal law, would not fall within that exemption.

However, at oral argument, the FDIC conceded its argument that it fell within the exemption of SCUTPA. Instead the FDIC relied on the *D'Oench* doctrine and argued that the *D'Oench* would prevent a finding of liability on the SCUTPA. FDIC offered no explanation of how *D'Oench*, applied to these facts, would shield the FDIC from liability for unfair trade practices in its dealings with Plaintiffs. Accordingly, FDIC failed to make its case for summary judgment on the SCUTPA claim.

Regarding relief available to the Plaintiffs under SCUTPA, the FDIC contends that punitive damages are not appropriate against the FDIC, as receiver for a failed bank. In case law discussing usury laws, courts have held that awarding punitive damages against the receiver of a failed bank is inappropriate. "The purpose of [punitive damages] which is to prevent the repetition of the offense, does not exist when the bank is in process of liquidation and its activities are being progressively curtailed." *Anderson v. Hershey*, 127 F.2d 884 (6th Cir. 1942) (discussing the discussing provisions of the National Banking Act regarding usurious transactions); *Federal Deposit Insurance Corp. v. Aroneck*, 509 F.Supp. 553 (D.S.C. 1979) aff'd in pertinent part and vacated in part 643 F.2d 164 (4th Cir. 1981) (FDIC cannot be held liable for usurious interest collected prior to its receivership).

This court is in agreement with the reasoning that

requiring the FDIC as receiver for a failed banking institution to pay punitive damages would be harmful to the creditors and depositors that the FDIC was established to protect and would not serve a punitive or deterrent function as against the actual wrongdoers. See *Tuxedo Beach Club Corp. v. City Federal Savings Bank*, 749 F.Supp. 635, 650 (D.N.J. 1990). Accordingly, if the Plaintiffs ultimately prevail on their SCUTPA claim against the FDIC, the Plaintiffs cannot recover punitive or treble damages from the FDIC.

Finally, FDIC has moved for summary judgment on Plaintiffs' complaint of wrongful dishonor. The same complaint was made by Plaintiffs when HHB&T was still the defendant and before the FDIC was appointed receiver. In an order dated April 24, 1990, as amended, May 14, 1990, this court determined that HHB&T was a confirming bank under S.C. Code Ann. § 36-5-104(1) and sustained the wrongful dishonor cause of action against HHB&T. Two documents, offered by the Plaintiffs at that time, indicated that Feaster, a Vice President at HHB&T, had confirmed the letter of credit, long after HHB&T had paid the funds pursuant to the escrow agreement.

Unfortunately, unlike HHB&T, the FDIC is protected by 12 U.S.C. § 1823(e) which requires that agreements that are not a part of the official record of the bank or that were not approved and a part of the minutes of the board or a loan committee, cannot be used to diminish or defeat the assets acquired by the FDIC. The two letters that the Plaintiffs offer as evidence that HHB&T confirmed the letter of credit, are not a part of the banks' official records, as testified to by the affidavit of Carl V. Raushchenberg, Jr., an account officer for the FDIC. The letters contradict the records of the bank and cannot be used to impose a liability on the bank.

Appendix E

During the hearing for summary judgment, plaintiffs' counsel impliedly asserted that the bank had originally produced the Feaster letter that confirmed the letter of credit from the bank's records to the plaintiffs. The court asked counsel to affirm his statement.

By letter, plaintiffs' counsel informed the court that plaintiffs had attached the letter as an exhibit to their complaint and that the bank received it with the summons. Thereafter, the bank sent a copy of the letter, as it had been attached to the complaint, to its counsel as part of a criminal investigation of Feaster. Later Plaintiffs sought the information given on Feaster to counsel and received the document back from the bank in discovery. Counsel's response makes clear that the Feaster confirmation letter was not first produced by the bank in discovery as an original document from the bank' records Thus, the court finds that plaintiffs have offered no credible evidence that the confirming letter was a part of the official bank records within the meaning of *D'Oench.* Accordingly, summary judgment should be granted on the count for wrongful dishonor.

IT IS ORDERED that the FDIC's motion for summary judgment is hereby granted on the claims for civil conspiracy, wrongful dishonor, and fraud, as the allegations of fraud relate to confirmation of the letter of credit.

IT IS FURTHER ORDERED that the FDIC's motion for summary judgment on the issue of the recovery of punitive damages against the FDIC as receiver for HHB&T is hereby granted.

IT IS FURTHER ORDERED that the FDIC's motion for summary judgment on the Plaintiffs' claims for relief under

SCUTPA, and for fraudulent misrepresentation by Feaster that a deposit of approximately twelve million dollars on behalf of SAFIG was held at the bank, is hereby denied.

IT IS SO ORDERED.

Charleston, South Carolina
September 28, 1993

s/ Falcon B. Hawkins
Falcon B. Hawkins,
Chief District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, BEAUFORT DIVISION FILED OCTOBER 16, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

C.A. # 9:92-308-1

ROBERT H. YOUNG and EDX HOLDINGS, INC.,

Plaintiffs,

vs.

RAYMOND JONES, WILLIAM RUTH, ALFRED MARTIN, GENERAL BENNETT, TOM WHELAN, CLAUDE SURFACE, CON FECHER, ED HUGHES, HELEN CORK, WILLIAM EAXLEY, TOM RUHF, GEORGE STRICKLAND, ANN GROSSHEUSCH, CATHY MCGILL, other possible officers and directors of HILTON HEAD BANK and TRUST, N.A., after July 1988, not yet ascertained, the FEDERAL DEPOSIT INSURANCE CORPORATION in its corporate capacity, and PRICE WATERHOUSE,

Defendants.

ORDER

This matter is before the court on three motions. Price Waterhouse, Chartered Accountants, a Bahamian partnership (PW-Bahamas), has moved for a dismissal pursuant to Rule

12(b)(2) of the Federal Rules of Civil Procedure[1], alleging that this court lacks personal jurisdiction over it as defendant in this action because PW-Bahamas has insufficient contacts with the forum to meet the constitutional requirements for due process. The PW-Bahamas' motion was filed April 1, 1992.

As a part of its motion to dismiss, PW-Bahamas has moved for judgment on the pleadings as permitted by Rule 12(c). Pursuant to Rule 12(c), if evidence outside the pleadings is considered on a motion for judgment on the pleadings, the motion shall be treated as a motion for summary judgment and disposed of pursuant to Rule 56. The parties herein conducted discovery and submitted evidence on PW-Bahamas' dismissal motion, which the court considered.

Secondly Price Waterhouse-United States (PW-US) filed a motion April 2, 1992, to be dropped as a party pursuant to Rule 21, or, in the alternative, for dismissal for failure to state a claim pursuant to Rule 12(b)(6). In July 1922, PW-US also filed a motion to be dropped as a party because certain members of the U.S. partnership are not diverse from plaintiffs.

The third motion is a motion to amend the complaint, which was filed by plaintiffs to cure the diversity problem. The proposed amendment deletes PW-US as a party defendant, but names three members of the PW-US partnership who reside in South Carolina.

The moving parties and their opponents appeared before the undersigned to present evidence and argument on all three motions on Monday, September 28, 1992.

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1. Hereinafter all references to rules shall be in reference to the Federal Rules of Civil Procedure.

Appendix F

As background, this suit arises from an investment transaction. Plaintiffs are investors from Texas who deposited over a half-million dollars in a South Carolina bank and the funds have disappeared.

PW-Bahamas issued an unqualified audit letter regarding the financial statement of Swiss American Fidelity and Insurance Guaranty (SAFIG). Plaintiffs aver that on the basis of that financial statement, they deposited $550,000.00 in a South Carolina bank. Other defendants, not involved in the motions herein, allegedly sent the money from the South Carolina Bank to SAFIG. The financial statement of SAFIG was falsified. The plaintiffs' money and its investment potential has been lost to the plaintiffs and it is for these losses that the plaintiffs seek to recover damages.

Plaintiffs' motion to amend the complaint was the last filed of the three before the court, but will be considered first. Plaintiffs contend that if their proposed amendment of parties is granted, it will moot the July motion filed by PW-US to be dropped as a party.

The complaint, as amended, would name as defendants, in relevant part:

> Price Waterhouse, Chartered Accountants, a Bahamian general partnership; Lee S. Piper; Herbert C. Schulken, Jr.; Dennis J. Goginsky; and other possible individual partners of Price Waterhouse, a New York general partnership, such as are residents of South Carolina, not yet ascertained.

Appendix F

There is support for plaintiffs' position that joinder of only the South Carolina members of PW-US, and dismissal of non-diverse members of PW-US, will technically cure the defect in the pleadings that joins defendants not diverse to plaintiffs.

In 1948 the Fourth Circuit court of Appeals opined in *Weaver v. Marcus*, 165 F.2d 862 (4th Cir. 1948), that nondiverse partners may be dropped and the suit maintained against diverse partners alone when liability is joint and several. In *Weaver*, administrators of Weaver's estate sued members of a partnership, individually and as partners, for the wrongful death of the deceased. Unbeknownst to plaintiffs, one partner, Carl Marcus, was non-diverse. Upon motion to drop Carl Marcus, the court noted that because partners are jointly and severally liable for the negligent acts of agents or employees acting within the apparent scope of their authority, individual partners can be sued without requiring the joinder of other partners.

Plaintiffs also cite *South Carolina Electric & Gas Co. v Ranger Constr. Co.. Inc.*, 539 F.Supp. 578 (D.S.C. 1982), as more recent support for the *Weaver* opinion. However, *S.C.E. & G.* did not involve a partnership or partners. The *S.C.E. & G.* case cited *Weaver v. Marcus* only for the proposition that it is appropriate by Rule 21 motion to drop a non-diverse tortfeasor if liability would be joint and several and the tortfeasor's presence in the suit would destroy diversity. *Id.*, 539 F.Supp. at 580.

More recently the *Weaver* decision and others similar to *Weaver*, have been criticized. Cf. *Cunard Line Ltd. v. Abney* 540 F.Supp. 657 (S.D.N.Y. 1982) (criticizes *Weaver* and other cases cited therein). *Cunard Line Ltd. v. Abney* points out that permitting suit solely against diverse partners, even if liability

is joint and several, is a means to sue the partnership and to circumvent the rule that the citizenship of a partnership is determined by all partners. Therefore, while *Weaver* may not have been overruled, it is perhaps weak precedent. Furthermore, the *Weaver* court acknowledged problems not raised by the motion to drop Marcus and not resolved by the opinion,

> [w]e do not think it necessary here to consider or decide, if judgment is obtained here by plaintiffs with [the non-diverse partner] dropped as a party, the extent to which the judgment would be binding on [him] under the doctrine of res adjudicata, or whether under such a judgment, execution could be levied on all the assets of the partnership.

Weaver v. Marcus, 165 F. 2d at 865. These problems have yet to be resolved by case law.

Therefore, this court is not convinced that the assertion of subject matter jurisdiction over the South Carolina partners of PW-US herein would rest on solid ground in light of plaintiffs failure to allege any wrongdoing by any of the partners as individuals, but only against the partnership, vicariously.

The first cause of action alleged in the amended complaint is that the Bahamian accounting firm negligently performed an audit and negligently released an audit letter upon which the plaintiffs relied to their detriment. There are no allegations that PW-US, or any individual U.S. partner who resides in South Carolina, was involved in the subject transaction. The only connection between the allegations of negligence and the U.S.

firm are conclusory allegations that the Bahamian partnership and the U.S. partnership operate as a partnership, or in the alternative, are a partnership by estoppel.

PW-US vigorously opposes the amendment because there are no allegations of wrongdoing by any member of the stateside partnership who resides in South Carolina. Additionally, PW-US argues that the amendment would not change the position of PW-US that the pleadings fail to state a claim against PW-US or any of its partners, individually, wherever residing. Defense counsel urged the court to consider its motion for dismissal whether on behalf of PW-US as named in the original complaint or on behalf of the South Carolina partners of PW-US as named in the amended complaint.

In response, plaintiffs' counsel argued at hearing that it would be procedurally irregular to grant the motion to amend but then allow counsel for PW-US to argue for dismissal for failure to state a claim on behalf of the South Carolina partners alone, without requiring the new defendants to assert their own 12(b) motions. Plaintiff's counsel urged the court to amend the pleadings but to require PW-US to argue its Rule 12(b)(6) motion at some later date when a "new" motion could be filed on behalf of the South Carolina partners individually.

During hearing plaintiffs' counsel acknowledged that he received discovery on the partnership issues during the first week of August 1992. He did not contradict counsel for PW-US's statement that he had not complained as to the completeness of the response. Plaintiffs' counsel claims that he did not review the discovery on the issue of vicarious liability between the two entities prior to the hearing because a formal dismissal motion on behalf of the South Carolina partners alone had not been

filed. The court notes that it was the plaintiffs who first raised this issue of vicarious liability between the two Price Waterhouse entities in response to PW-US and PW-Bahamas' motions in May, 1992 and plaintiffs have had ample time to study the issue. See, Plaintiffs' Request for Enlargement of Time To Respond to Two Price Waterhouse Motions to Dismiss, filed May 7, 1992.

Nonetheless, as a general rule amendment should be liberally granted. Rule 15(a), Federal Rules of Civil Procedure. In this particular case, there seems to be no reason not to permit the amendment, because whether the pleadings are as originally filed or as amended the posture of the PW-US partnership is the same.

In addition, the court finds that there would be no prejudice to plaintiffs should the court consider PW-US's motion for dismissal pursuant to Rule 12(b)(6) on behalf of the South Carolina partners now rather than at a later date. No hardship will befall plaintiffs because the motions have been on file for months and the parties have been afforded an opportunity for discovery on the issues presented therein. Therefore, the court grants defense counsel's oral motion to consider PW-US's written 12(b)(6) motion on behalf of the South Carolina partners of PW-US remaining after the amendment of the complaint.

Those issues resolved, the court returns to the remaining motions, now being considered in light of the facts as alleged in the amended complaint, which are: PW-Bahamas' motion to dismiss for lack of personal jurisdiction; and, PW-US's motion, on behalf of the South Carolina partners, to dismiss for failure to state a claim.

PW-Bahamas has moved for dismissal for a lack of personal

jurisdiction. A determination of whether this court may exercise personal jurisdiction over a non-resident defendant requires a two-step analysis. First, the court must determine if the non-resident defendant's conduct meets the requirements of the South Carolina long-arm statute, which is found at S.C. Code Ann. § 36-2-803. Second, the court must determine if the non-resident defendant had sufficient contacts with the forum state to meet the constitutional standards of due process. *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 388 S.E.2d 796 (1990) (citing *Hume v. Durwood Medical Clinic, Inc.*, 282 S.C. 236, 318 S.E.2d 119 (Ct. App. 1984)).

South Carolina's long-arm statute extends to the constitutional limits imposed by the due process clause. *Triplett v. R.M. Wade & Co.*, 261 S.C. 419, 200 S.E.2d 375, 379 (1973); *see also*, S.C. Code § 36-2-803. As a result, the state law analysis collapses into the constitutional analysis. Therefore, the question is simply whether the defendant, in this case PW-Bahamas, has sufficient "minimum contacts" with South Carolina such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). As the Supreme Court has traditionally noted: "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, at 253, 78 S.Ct. 1228, at 1240, 2 L.Ed.2d 1283 (1958).

Plaintiffs' allege that an unqualified audit letter concerning a financial statement of an association, SAFIG, was issued by a

Bahamian accounting office. The letterhead identified the Bahamian accounting firm only as "Price Waterhouse." The audit letter also bore a Price Waterhouse trademark and was signed "Price Water house."

Plaintiffs assert that it was foreseeable to the accounting firm that issued the letter that third-parties would rely upon the financial statement, the subject of the audit letter. According to the plaintiffs, the stamp of approval created by Price Waterhouse's audit letter of SAFIG's financial statement lent credence to the defrauders' claims so that plaintiffs were induced to invest to their detriment.

The Plaintiffs' argument as to PW-Bahamas' jurisdictional contact can be distilled to its essential elements as such: PW-Bahamas audited the financial statement of a company that had its sole asset located in South Carolina; thus, it was foreseeable to PW-Bahamas that it could be haled into court in South Carolina.

In rebuttal, PW-Bahamas proffers the affidavit of Thomas F. Hackett, a partner in PW-Bahamas. PW-Bahamas asserts a lack of minimum contacts with the forum state such that the exercise of personal jurisdiction over PW-Bahamas would offend traditional notions of substantial justice and fair play.

Mr. Hackett attests that PW-Bahamas is a partnership organized and existing under the laws of the Bahamas. He further alleges that the partnership is not now, nor has it ever been, organized or incorporated under the laws of the State of South Carolina; moreover, the partnership has never been registered here with the Secretary of State.

Appendix F

Further, PW-Bahamas declares that it has no offices, agents, or employees and no property, real or personal, located within the State of South Carolina and it has not engaged in business within the state. Additionally, PW-Bahamas insists that no one has ever traveled to the State of South Carolina to conduct business on behalf of PW-Bahamas. Finally, PW-Bahamas contends that it has never contracted to supply services in the State of South Carolina, nor has it entered into any contract to be performed in whole or in part in South Carolina.

Plaintiffs have submitted, as evidence of PW-Bahamas's contact with South Carolina, a form that was submitted to the South Carolina bank to confirm the deposits of the Swiss association. The form was to be returned upon completion to PW-Bahamas. There is no evidence that PW-Bahamas mailed the form to the bank; however, there is some evidence that the form was completed and the information contained therein was used by the accounting firm to substantiate its audit of SAFIG's financial statement.

Plaintiffs also offer a memo, which purportedly transmitted a copy of the Price Waterhouse audit letter to Mr. Paul Knowles, whose address is in Nassau, Bahamas, but whose connection with this case has not made known to the court. The memo was prepared by an unidentified author on stationary that bears no identifying marks as to origin and the memo names two members of the firm of Price Waterhouse in the Bahamas as having participated in the preparation of the audit letter on the financial statement of SAFIG. The memo suggests that there was some contact between PW-Bahamas and the South Carolina bank in the receiving of information from the bank that SAFIG had a deposit in excess of $12 million in South Carolina.

PW-Bahamas does not deny that it prepared the audit letter. Furthermore, PW-Bahamas does not deny that it received information verifying the SAFIG deposit in the South Carolina bank.

Although, it may have been foreseeable that the audit letter of the financial statement would be relied upon by investors, there is no evidence that PW-Bahamas had any contact with the plaintiffs other than to have had the audit letter shown to them. There is no evidence that PW-Bahamas had any contact with the forum other than the verification of the bank deposit for the audit letter. "[F]oreseeability alone . . . has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, at 295 (1980). Even if plaintiffs could prove that they invested solely on the basis of the audit letter's confirmation that $12 million dollars was deposited in a South Carolina bank, PW-Bahamas single act of preparing the audit letter does not supply sufficient contact with South Carolina to confer personal jurisdiction. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 1239-40.

The minimum contacts test requires that the defendant have had sufficient contact with the forum state such that he could foreseeably have expected to have been sued within the forum. PW-Bahamas connection with the South Carolina bank in which it attempted to obtain verification of the balance on deposit in an account is not tantamount to a solicitation of business in South Carolina or a purposeful availment to the privilege of conducting business in South Carolina. See, *Hanson v. Denckla*, 357 U.S. 235, 251-253, 78 S.Ct. 1228, 1239-40 (1958).

Appendix F

Given the fact that matters outside the pleadings have been considered for a determination of this motion to dismiss and discovery as to the jurisdictional issue has taken place, the plaintiffs bear the burden of proving by a preponderance that the court's exercise of jurisdiction is proper. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). Plaintiffs' proffer of evidence is inadequate to demonstrate "minimum contacts" with the forum sufficient to meet the test of due process. Accordingly, the court finds that there are insufficient contacts with the forum for this court to exercise personal jurisdiction over PW-Bahamas. However, plaintiffs assert a unique argument that the contacts of the PW-US partnership should be considered contacts by the PW-Bahamas' firm, because allegedly, the two are either a partnership in fact, or a partnership by estoppel. Accordingly, the court will address the partnership allegations and the evidence submitted on that issue.

Plaintiffs assert that PW-Bahamas and PW-US operate as a partnership, i.e., constitute an association of persons to carry on, as owners, business for profit. In the alternative, plaintiffs contend that if the two are associations are not actually operating as partners they are operating as partners by estoppel.

Defendants PW-US and PW-Bahamas flatly deny that a partnership exists between the two entities and have supplied, under seal, copies of relevant documents executed which establish that the two entities are separately organized. Counsel for plaintiffs admits that he has found nothing which establishes that the two entities are partners in fact. The evidence presented wholly belies plaintiffs claims that PW-Bahamas and PW-US are operating as a partnership in fact. Thus, the court finds that there is no partnership, in fact, between PW-Bahamas and PW-US.

Then, plaintiffs make a double-edged argument that PW-US is a partner by estoppel of PW-Bahamas. On the one hand, the argument is that if the two partnerships are partners by estoppel, then the court has personal jurisdiction over PW-Bahamas, as PW-US's partner by estoppel, because PW-US has at least "minimum contacts" with South Carolina. On the other hand, the argument for estoppel seems to be that if the two partnerships are partners by estoppel then PW-US can be held liable for the negligent acts of its partner PW-Bahamas, so the claim against PW-Bahamas operates as a claim against PW-US. Therefore, the court will review the evidence that plaintiffs have presented on the issue of partnership by estoppel on both the Rule 12(b)(2) motion presented by PW-Bahamas and the Rule 12(b)(6) motion presented by PW-US.

As a general rule, persons who are not partners as to each other are not partners as to third persons. S.C. Code Ann. § 33-41-220 (Law. Co-op 1976). However, a person who represents himself, or permits another to represent him, to anyone as a partner in an existing partnership or with others not actual partners, is liable to any such person to whom such a representation is made who has, on the faith of the representation, given credit to the actual or apparent partnership. S.C. Code Ann. § 33-41-380(1). This exception to the general rule for liability by partners by estoppel is statutorily created under the Uniform Partnership Act in the version adopted by the State of South Carolina.

Generally, partners are jointly and severally liable for everything chargeable to the partnership. S.C. Code Ann. § 33-41-370. In South Carolina, a partnership is an entity separate and distinct from the individual partners who compose it. *South Carolina Tax Comm. v. Reeves*, 278 S.C. 658, 300 S.E.2d 916

(1983). Therefore, plaintiffs' argument is that if the court would find that PW-Bahamas and PW-US are partners by estoppel, PW-US would be jointly and severally liable with PW-Bahamas for everything chargeable to the partnership of the two firms. Moreover, if the two partnerships are partners by estoppel, the individual partners of PW-US would then be jointly and severally liable for the negligent acts of the PW-Bahamas partnership.

Plaintiffs maintain that Price Waterhouse holds itself out to be a partnership with offices around the world. According to the plaintiffs, the U.S. affiliate makes no distinction in its advertising between itself and entities situated in foreign jurisdictions. The foreign affiliates are permitted to use the Price Waterhouse name and trademark. Plaintiffs urge the conclusion of partnership by estoppel from the combination of facts that Price Waterhouse promotes its image as an organization affiliated with other Price Waterhouse offices around the world and that it is common knowledge that the accounting firm of Price Waterhouse operates as a partnership.

Plaintiffs offer for illustration that PW-Bahamas and PW-US hold themselves out to be partners with one another, a Price Waterhouse brochure, picked up by plaintiffs' counsel at a litigation services seminar, that describes Price Waterhouse as one of the "world's largest and most respected professional organizations." The brochure states: "[O]ver 28,000 Price Waterhouse professionals in 400 offices throughout the world can be called upon to provide support for your reorganization and litigation efforts." Plaintiffs assert that assurances like that contained in the brochure cast Price Waterhouse as an established international accounting firm and that the image, promoted by PW-US, is designed to gain public confidence in the firm's stability and expertise.

However, the plaintiffs do not contend that the brochure submitted was seen or relied on by them in making the decision to invest. In addition, plaintiffs point to nothing in the brochure that asserts that the affiliated entities of Price Waterhouse are liable for the acts of another, or that any of the affiliates operate within a single partnership.

To bolster their argument, Plaintiffs sought to discover certain documents filed in a 1980 suit, entitled *Cross v. Price Waterhouse*, which resulted in a September 27, 1982, order. The court in *Cross* allegedly found that the U.S. partnership of Price Waterhouse was vicariously liable for negligence of the Bahamas firm of Price Waterhouse.

Defendant PW-US supplied copies of the relevant *Cross* documents which showed that the order of Judge Pratt was later vacated. Furthermore, PW-US informs the court that during the period in question in the *Cross* case, there were licensing agreements between the U.S. partnership and the Bahamian partnership for use of the name and trademark on which the decision was based. Such licensing agreements are no longer in existence.

PW-US points out that the South Carolina statute, which was cited by plaintiffs in support of their argument for partnership by estoppel, speaks only to the creation of liability to third-persons who, in reliance upon representations as to the existence of a partnership, "[give] credit" to that partnership. S.C.Code Ann. § 33-41-380(1) (Law. Co-op 1976). There is no evidence, neither has there been an allegation, that credit was extended on the basis of any representation of a partnership existing between PW-Bahamas and the South Carolina members of the PW-US partnership. There is no evidence of any extension

of credit to the either PW-Bahamas or PW-US, by plaintiffs. Thus, the facts do not support a finding of liability for partners by estoppel under the statutory law of South Carolina.

Further, there is no evidence that plaintiffs relied on any act or statement by any, PW-US partner which indicated a the existence of a partnership with the Bahamian partnership. Finally, there is no evidence, nor is there a single allegation that any member of the U.S. partnership had anything to do with the audit letter complained of by plaintiffs, or any other act related to the investment transaction.

The court cannot find any evidence to support a finding of partners by estoppel. Therefore, the allegations of negligence against PW-Bahamas cannot serve to hold individual members of the PW-US partnership in the suit. Without PW-US' contacts with the forum, there are insufficient contacts with South Carolina for PW-Bahamas to reasonably expected to have been haled into court here.

For the reasons hereinabove stated, the court hereby grants the plaintiff's motion to amend the complaint to join the U.S. partners of Price Waterhouse who reside in South Carolina.

Further, the court hereby grants PW-Bahamas' motion to dismiss for lack of personal jurisdiction.

Further, the court dismisses the three South Carolina partners of PW-US, and those yet ascertained, for failure to state a claim against them upon which relief can be granted.

IT IS SO ORDERED.

Appendix F

s/ Falcon B. Hawkins
Falcon B. Hawkins
Chief District Judge

Charleston South Carolina
October 16th 1992

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, BEAUFORT DIVISION FILED APRIL 24, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CIVIL ACTION #89-1398-1

ROBERT H. YOUNG AND EDX HOLDINGS, INC.,

Plaintiffs,

vs.

HILTON HEAD BANK & TRUST COMPANY, N.A.; FIRST PACIFIC CORPORATION; JOHN ROCHE; SWISS-AMERICAN FIDELITY INSURANCE COMPANY AND GUARANTEE, LTD.; ATTILIO FRANCUILLI; TONY HABIB; BRUCE BENN; AND CORPORATION HOUSE, LTD.

Defendants.

ORDER

This case arises out of a failed financing operation. On June 2, 1989, plaintiffs filed suit in this court alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c), 1962(d) *et seq.*, and state law claims concerning the South Carolina Unfair Trade Practices Act, fraud, civil conspiracy, conversion, breach of contract, and wrongful dishonor. This complex matter involves eight parties.

Plaintiff EDX Holdings, Inc. ("EDX") is a corporation organized under Delaware law and was established on

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September 2, 1988, to operate and acquire oil and gas properties. Plaintiff Robert H. Young ("Young") is a citizen of Texas and is the president and chief executive officer of EDX. Before September 2, 1988, Young acted for himself individually and, after that date, he acted for the corporation as its president.

Hilton Head Bank and Trust, N.A. ("HHB&T") is a bank with its principle place of business in Hilton Head, South Carolina. HHB&T is also the depository of funds of Swiss American Fidelity Insurance Company Guarantee Limited ("SAFIG"). SAFIG is an unlicensed insurance corporation, organized under the law of the Commonwealth of the Bahamas, and it issued and sold Letters of Credit. SAFIG also sold what essentially amounted to insurance policies ("surety bonds") to insure the performance of borrowers in loan transactions. John Roche ("Roche") is an agent and general manager for SAFIG. First Pacific Corporation ("First Pacific") is a corporation organized under Florida law, and it operates as a broker in Letters of Credit for credit enhancement. First Pacific is owned and controlled by Tony Habib ("Habib") and Attilio Francuilli ("Francuilli"). Habib and Francuilli are also shareholders and directors of SAFIG. Bruce Benn ("Benn") is a resident of Canada, and is a shareholder and partner in Corporation House, Ltd. Corporation House, Ltd. is a Canadian partnership with its principal place of business in Ottawa, Canada.

This matter is before the court on numerous motions filed by the plaintiffs and the defendants. Extensive memorandums were filed and oral arguments were heard on January 25, 1990, and the motions as listed below were disposed of as follows:

> Plaintiffs' motion for preliminary injunction filed 6/2/89 was denied from the bench.

HHB&T's motion to strike an untimely pleading was granted from the bench at the hearing.

Plaintiffs' numerous discovery motions filed 11/20/89, 11/30/89, 1/9/90, 1/10/90 and 1/16/90 and defendants' renewed motion for protective order filed 1/3/90 were granted from the bench.

Motion by defendant HHB&T to dismiss the complaint for failure to state a claim filed 7/20/89, and motions addressing this issue filed by the remaining defendants on 7/17/89, 10/16/89, 12/1/89 and 1/16/90; motions by all defendants excepting HHB&T, Benn and Corporation House to dismiss the complaint for lack of personal jurisdiction filed 7/18/89, 8/22/89 and 10/16/89; motions filed by various defendants to dismiss defendant Roche's cross-claim filed 8/8/89, 10/24/89 and 12/18/89, are hereinafter discussed in detail.

HHB&T does not contest the jurisdiction of this court. While HHB&T obviously had to defend this lawsuit in South Carolina, out of the other defendants, only Benn and Corporation House chose to answer and make a motion to dismiss. By doing so, Benn and Corporation House waived any objections they could have made to this court's jurisdiction over them. *See* Fed. R. Civ. P. 12. As to the motions of the other defendants to dismiss on jurisdictional grounds, this court on February 23, 1990, issued an order granting these parties ninety days for additional

discovery for the purpose of determining whether this court has personal jurisdiction over them. Since this court has not ruled on the personal jurisdiction question with respect to these other defendants, the court will not address their substantive motions to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) at this time.

Thus, the court hereinafter addresses HHB&T's motion to dismiss for failure to state a claim as well as the same motion by Benn and Corporation House. Since Benn and Corporation House essentially adopted the memorandums of HHB&T, the court will address how these issues effect Benn and Corporation House in footnotes. In ruling on these motions, the court presumes all factual allegations of the complaint are true and makes all reasonable inferences in favor of the non-moving party. *Miree v. DeKalb County Georgia,* 433 U.S. 25, 97 S.Ct. 2490 (1977); *Menasco, Inc. v. Wasserman,* 886 F.2d 681, 682, 684 (4th Cir. 1989) (agreeing with district court's 12(b)(6) dismissal of RICO action because plaintiff had not adequately shown the requisite "pattern" but allowing amendment because of intervening Supreme Court authority); *See also* 2A J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 12.07[2.-5] (2d ed. 1981 & Supp. 1989-90). Finally, a district court's dismissal under Rule 12(b)(6) is with prejudice unless it specifically orders dismissal without prejudice. *Carter v. Norfolk Community Hosp. Ass'n,* 761 F.2d 970, 974 (4th Cir. 1985).

BACKGROUND

In the spring of 1986, with oil prices falling, plaintiff Young concluded that he would invest in oil and gas property. To secure the roughly $600 million needed for these purchases, Young began negotiations with ABN Bank Canada in Toronto,

Canada. This bank referred Young to Benn of Corporation House, and that is when Young says his problems started.

Benn told Young that Corporation House could arrange the needed funding in installments of about $50 million. Because time was important, Benn recommended Young finance his deal with a kind of "credit-enhanced" loan. Under this deal, Corporation House, through Benn, would secure Letters of Credit, issued by other international banks in Young's favor, through First Pacific. First Pacific would get a fee for arranging this deal. These Letters of Credit would then serve as collateral to enable Young to obtain the money to buy the oil and gas property.

To prevent the cashing of the Letters of Credit, Young bought a surety bond to secure the Letters of Credit in case of a default. If there was a default, the surety bond holder would liquidate the oil and gas property to recover. Benn referred Young to John Roche, the general manager of SAFIG, to provide the surety bonds. Young paid Roche a $50,000 fee for the promised financing.

The financing of the deal was somewhat complicated. SAFIG was to issue the surety bond and that bond would cover the first $55 million Letter of Credit. For this service, SAFIG would charge $2,200,000, with $550,000 to be paid to SAFIG up front. This $550,000 was refundable until SAFIG issued the surety bond, and only EDX could authorize the issuance of that bond. Instead of giving cash to SAFIG, Young provided a Letter of Credit to SAFIG for $550,000 drawn on his bank in Dallas, Texas. On September 16, 1988, on instructions of Roche, Benn, Francuilli and Habib, Young delivered this Letter of Credit to SAFIG. Apparently Young thought this Letter of

Credit would be delivered to HHB&T, where SAFIG had an account, to be held there. Roche and Benn assured Young that his $550,000 Letter of Credit was not at risk. Roche assured Young that the first $55 million Letter of Credit would be forthcoming from First Pacific within thirty days.

On or about September 20, 1988, without Young's consent, Young's $550,000 Letter of Credit was assigned by SAFIG to First Pacific instead of being sent to HHB&T for holding. Francuilli, the co-owner of First Pacific, unsuccessfully attempted to cash this Letter of Credit at a bank in Miami. Via phone on this date, Roche and Benn attempted to sooth Young's fears concerning the improper attempt to deposit his Letter of Credit. Following this incident, Young told Benn that he wanted nothing further to do with First Pacific, Habib or Francuilli. Unknown to Young, Habib and Francuilli were owners and directors of SAFIG and were, essentially, the employer of Roche.

At this point, Roche and Benn persuaded Young to borrow $550,000 from his Dallas bank and wire that cash to HHB&T. This money was to perform the same function that Young's $550,000 Letter of Credit had done earlier, namely to serve as front money for a future surety bond to secure a Letter of Credit which would allow Young to get the money for the oil and gas property. Young's cash was secured, or so he was told, by a $550,000 Letter of Credit issued by SAFIG and drawn against SAFIG's account at HHB&T. On September 22, 1988, SAFIG issued this Letter of Credit. Young believed this SAFIG Letter of Credit secured his $550,000 because Roche supplied Young with an audited financial statement, prepared by Price Waterhouse Co., which showed approximately $12 million on deposit with "a South Carolina bank", impliedly HHB&T. Habib signed this false financial statement. Via phone, Benn assured Young that the $550,000 would remain at HHB&T.

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On or about September 30, 1988, despite Young's efforts to prevent it, First Pacific ordered the $550,000 Young had sent to HHB&T transferred to a SAFIG account at Credit Suisse Bank in Miami. Roche now tried to prevent Young from discovering that the transfer had occurred.

On or about October 5, 1988, Roche told Young that SAFIG was still working to get the surety bond to protect the Letters of Credit that were supposed to be issued by other foreign banks. On or about October 15, 1988, Roche denied to Young that Roche reported to Habib and Francuilli of First Pacific in Miami. On or about October 25, 1988, Roche assured Young that even larger Letters of Credit could be obtained than were originally expected, and that SAFIG would be the surety on these transactions. On or about October 27, 1988, First Pacific sought to protect itself by purporting to cancel its relationship with Young. On November 15, 1988, Roche and Benn told Young that they were preparing a proposal to obtain $100 million in Letters of Credit from banks in Europe. That same day, Roche told Young that the Letters of Credit for $100 million had been secured and would become available the next day.

On or about November 17, 1988, Roche requested Young not call for his $550,000 in cash until December 15, 1988. Roche said the SAFIG Letter of Credit, which supposedly guaranteed Young's cash, would be reissued and remain valid until January 15, 1988. Also on November 17, 1988, Benn said he would co-ordinate the arrangements. On or about December 13, 1988, in order to induce Young and his Dallas bank to continue the loan, SAFIG paid the Dallas bank $6,225.71 as prepaid interest on the $550,000 Young had sent to them.

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On or about December 22, 1988, Mark Feaster ("Feaster"), an agent and employee of HHB&T, acting in the course and scope of his employment, sent Young's Dallas bank a letter dated December 21, 1988, from Roche to Feaster. In this letter, Roche told HHB&T to pay Young's Dallas bank on SAFIG's Letter of Credit if payment was demanded on it Also on December 22, Roche and Benn again told Young the financing of the deal would be ready to close on January 10, 1989.

Subsequently, Young's Dallas bank requested confirmation from HHB&T that it would honor the $550,000 SAFIG Letter of Credit, drawn in favor of the Dallas bank, should the Dallas bank wish to cash the Letter of Credit. On January 9, 1989, a letter from Feaster of HHB&T to Young's Dallas bank did "acknowledge receipt and confirmation of the attached documentation". The record does not reveal what this "attached" documentation was. Young says that HHB&T knew or should have known that SAFIG would not honor its Letter of Credit.

On January 20, 1989, Feaster mailed to Young's Dallas bank a letter confirming the SAFIG $550,000 Letter of Credit. This letter had a signature space above the typed name "Mark E. Feaster", but the letter was not signed. Young's position is that this amounted to HHB&T guaranteeing the SAFIG Letter of Credit.

On January 24, Young's Dallas bank made a written demand for payment on the $550,000 SAFIG Letter of Credit. On February 4, 1989, Roche and Benn told Young "not to worry" and that Young would be paid. On February 8, 1989, Young's Dallas bank called HHB&T and was told by a cashier that there were no funds to pay the SAFIG Letter of Credit. On or about February 9, 1989, Feaster called Young's Dallas bank and said

he would send a wire payment to them on February 10, 1989. On or about February 13, 1989, Young's Dallas bank again called HHB&T and was told by a cashier that SAFIG lacked the funds to honor the Letter of Credit.

On or about February 15, 1989, attorneys for Young's Dallas bank made a written demand on HHB&T, requesting them to pay plaintiff his money. On or about February 17, 1989, Feaster told Young that SAFIG had the money to cover the $550,000 Letter of Credit. Further demands for the SAFIG Letter of Credit to be honored were made on February 24, March 4, March 7 and March 9. On March 10, 1989, Feaster assured Young that SAFIG had "enough" money to pay up.

In addition to the problems associated with this transaction, Young also alleges that SAFIG, Roche, Habib, Francuilli, First Pacific, Benn and Corporation House have been involved in similar schemes with other people who have been trying to get financing. However, the plaintiff does not allege that HHB&T has been involved in these other schemes. HHB&T's involvement through Feaster went from September of 1988 to March of 1989.

ANALYSIS

THE RICO CLAIMS

The first claims the court will address arise under RICO sections 1962(c) and 1962(d). The Supreme Court revisited its RICO analysis in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). In *H.J. Inc.*, the Court noted that there were serious "definitional problems" with the RICO statute which had to be addressed "directly." *Id.* at 2901 n.3. In addressing the concept of "pattern" under the RICO statute, the

Court rejected the Eighth Circuit's multiple scheme requirement and the Sixth Circuit's position that two predicate acts established a pattern. *Id.* at 2899. As the Court saw it, pattern required more than just two acts because there must be a "relationship" between the two acts. Since the statute said nothing about multiple schemes, the Court said those were not required either. A party satisfied the pattern requirement upon the pleading of "multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity." *Id.* at 2899.

While relationship was part of the picture, relationship was not enough by itself. In addition to being related, there also had to be some continuity. *Id.* at 2901. The Court said continuity could be shown by more than multiple schemes: " 'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 2902 *citing Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1989) (court rejected the multiple scheme requirement seeking to avoid the "anomalous result" of not punishing the more harmful "completed scheme"). In further describing continuity, the Court said:

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement:

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Congress was concerned in RICO with long-term criminal conduct.

H.J. Inc., 109 S.Ct. at 2902.[1]

Both parties dispute the effect this case has had on the Fourth Circuit's approach to RICO. While the plaintiffs would like to believe that *H.J. Inc.* liberated the RICO cause of action from the judicial hostility of the lower courts, such is not the case. While *H.J. Inc.* ended the multiple scheme requirement, it also said RICO activity lasting only a few weeks or months, which would satisfy all other requirements of the statute, was not of sufficient duration to be reached under the statute.[2] In

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1. The Court also noted that the *threat* of continuity can be adequate. In order to find a threat of continuity, the Court would look to the specific facts of each case. In the hopes of providing guidance to the lower courts, the Court gave some examples of threat of continuity. The examples of "threat of continuity" included a regular business which was part of a long-term association for criminal purposes and the regular operation of a legitimate business. Unfortunately, these elliptical examples do not provide much guidance to the courts attempting to enforce this statute.

2. Apparently in an attempt to avoid the problem posed by the short-term nature of this alleged fraud, the plaintiff contends that a criminal racketeering enterprise, which is intended to exist for several years but which is foiled after several months, should be deemed sufficient for the purposes of RICO continuity. Unfortunately for the plaintiff, the Supreme Court required the activity to extend over a "substantial period of time." *H.J. Inc.*, 109 S.Ct. at 2902. The Court noted that very short periods of criminal activity, without sufficient threat of continuity, are not reached by RICO; the activity must "amount to or threaten long-term criminal activity." *Id.* at 2902, n.4. However, the concurrence in *H.J. Inc.* clearly described the anomalous result that the majority rule created. As Justice SCALIA noted, "... I think [the Court] must be saying that at least a few months of racketeering activity (and who knows how much more?) is generally for free, as far as RICO is concerned. The 'closed period' concept is sort of a safe harbor for racketeering activity that does not last too long...." *Id.* at 2908 (Scalia, J. concurring).

determining whether a RICO pattern exists, the Fourth Circuit continues to look at the "criminal dimension and degree" of the alleged misconduct. *Data Bank v Zepkin,* 812 F.2d 149, 155 (4th Cir. 1987). Since *H.J., Inc.,* the Fourth Circuit has returned to this tortured statute a number of times.

In *Walk v. The Baltimore and Ohio Railroad,* 890 F. 2d 688 (4th Cir. 1989), the court returned to its earlier finding of insufficient pattern after the Supreme Court vacated and remanded that case for reconsideration in light of *H.J. Inc.* Previously, the Fourth Circuit had said that *Walk* had been its "closest question" in terms of continuity. *Walk* involved a closed-ended scheme centering around a proposed merger where the alleged predicate acts had occurred over a ten year period. *Id.* at 689. With the guidance of *H.J. Inc.,* the court changed its mind and decided that ten years was enough of a "substantial duration" to show "continuity." *Id.* at 690. The court left the determination of what constituted a "substantial" duration to a case-by-case analysis. *Id.* Similarly, in *Morley v. Cohen,* 888 F.2d 1006 (4th Cir. 1989), the court found sufficient evidence to uphold a jury verdict on a RICO count. In that case, the predicate acts occurred over about a five year period of time. *Id.* at 1010. Without much discussion, the court said the five year duration satisfied the continuity part of the pattern requirement. *Id.; see also Combs v. Bakker,* 886 F.2d 673, 677-678 (4th Cir. 1989) (selling 55,000 lifetime partnership over an unspecified, but apparently substantial, amount of time provided sufficient "continuity" to give rise to a "pattern" for the purposes of RICO).

In contrast, the Fourth Circuit found insufficient continuity in closed-ended schemes that went on for three and four months respectively. *Eastern Publishing and Advertising Inc. v. Chesapeake Publishing and Advertising Inc.,* 895 F.2d 971

(4th Cir. 1990); *Parcoil Corp. v. Nowsco Well Service, Ltd.*, 887 F.2d 502 (4th Cir. 1989). In *Eastern Publishing*, the court again returned to a case after the Supreme Court vacated the earlier opinion and remanded the case following *H.J. Inc.* The district court had dismissed the RICO cause of action for failure of the complaint to allege a "pattern" of racketeering activity. The Fourth Circuit's reconsideration was limited to the question of "pattern." The court found that the predicate acts all occurred within three months and that "the alleged end purpose of the activities was allegedly then accomplished." Saying only that the scheme here did not provide the requisite continuity either in its "intrinsic" nature or its sheer duration, the Fourth Circuit again affirmed the district court. Similarly, in *Parcoil*, the Fourth Circuit found insufficient continuity where the predicate acts occurred over a four month period of time. 887 F.2d at 504; *see also Menasco v. Wasserman*, 886 F.2d 681, 684-685 (4th Cir. 1989) (RICO cause of action did not adequately meet the continuity requirement apparently because the alleged fraud was "narrowly directed towards a single fraudulent goal" and occurred only over one year). The *Parcoil* court also found that there was no evidence that these allegedly illegal activities of the defendant were a "regular way of doing business." *Id.*

In applying these precedents to the case at hand, the plaintiffs have alleged neither sufficient continuity nor threat of continuity against the operations of HHB&T to withstand this motion to dismiss.[3] With respect to HHB&T, Young has

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3. Defendants also contend that the plaintiffs did not sufficiently allege an "association in fact" in their attempt to show "enterprise." *See United States v. Turkette*, 452 U.S. 576, 583 (1981). HHB&T contends that the plaintiffs have not adequately alleged that HHB&T was part of a structure which had conduct separate and apart from the alleged scheme. "It is an

(Cont'd)

alleged a short-term, single-purpose, single-victim scheme which does not sufficiently satisfy the continuity prong of the pattern requirement. Furthermore, the allegations place this activity as occurring within a small and discrete time—namely about seven months. These types of allegations are not sufficient to withstand this motion to dismiss. While the plaintiffs have not sufficiently alleged continuity, they have also not alleged any "threat" of continuity.[4] For instance, plaintiffs have not alleged, and

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(Cont'd)
essential element of the RICO cause of action that the 'enterprise' be apart from the underlying pattern of racketeering activity." *Seville Indus. Machinery v. Southmost Machinery,* 742 F.2d 786, 790 n.5 (3rd Cir. 1984) *cert. den.* 469 U.S. 1211 (1985); *United States v. Tillett,* 763 F.2d 628, 631 (4th Cir. 1985); *see also H.J. Inc. v. Northwestern Bell Telephone,* 109 S.Ct. 2893, 2898 n.1 (1989) (Court expressly declined to express an opinion as to this issue). Here, the association-in-fact is one and the same with the alleged scheme to defraud Young. HHB&T also contends the plaintiffs have not adequately alleged that HHB&T shared a common purpose with the other defendants. While paragraph 73 of the Complaint alleges both a separate structure as well as a common purpose, HHB&T is conspicuously absent from that paragraph. This court has already found that the plaintiff did not adequately plead a "pattern". As an alternative ground for dismissal, based on the forgoing, the court also finds that the plaintiff did not adequately plead an "enterprise."

4. In terms of the RICO cause of action, the plaintiffs, in paragraph 73 of their complaint, have alleged that Benn and Corporation House were part of an ongoing operation to defraud other investors. This allegation satisfies the continuity requirement of *H.J. Inc.* Similarly, the plaintiffs have alleged that Benn and Corporation House were part of an enterprise which had an existence apart from the fraud which is the subject of this lawsuit. This satisfies the enterprise requirement. Lastly, Corporation House contends that they should not be held vicariously liable for the acts of Benn. However, in their answer, Corporation House and Benn go to great lengths to make sure that it is understood that Benn is a "principal" of Corporation House. Since Benn is a "principal" instead of an agent, then the same problem of vicarious liability does not arise. Therefore, the court will not dismiss the RICO cause of action with respect to Benn and Corporation House.

probably cannot allege, that this type of alleged fraud is HHB&T's "regular way of conducting defendant's ongoing legitimate business." *See Menasco,* 886 F.2d at 685. As the Fourth Circuit concluded in *Menasco*: "If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim." *Id.* (citations omitted).

In addition to the problems with "pattern" and "enterprise", HHB&T argues that it cannot be held vicariously liable under RICO. The scope of such liability is unclear in this circuit.[5] The premise of respondeat superior liability is that one who is without fault may be held vicariously liable for the wrongdoing of another. W. Prosser, Law of Torts 458 (4th ed. 1971); *Schofield v. First Commodity Corp. of Boston,* 793 F.2d 28, 32 (1st Cir. 1986). This kind of liability, however, does not appear to be consistent with the Congressional intent behind 1962(c) liability. *Id.* at 33. Therefore, this court follows the majority position and finds that HHB&T cannot be held liable under 1962(c) based on *respondeat superior.* This rule follows from the basic premise that "the corporation-enterprise should not be liable when the corporation is itself the victim or target, or merely the passive instrument for the wrongdoing of others." *Haroco, Inc. v. American National Bank and Trust,* 747 F.2d 384, 401 (7th

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5. Although two district courts in this Circuit have said that RICO does allow respondeat superior liability,, *see Morley v. Cohen,* 610 F. Supp. 798, 811 (D.Md. 1985) and *Tyco Trucking Co v. Belk Stores Services,* 634 F. Supp. 1327, 1334 (W.D.N.C. 1986), both opinions adopted this view without analysis and are clearly in the minority. *See Schofield,* 793 F.2d 28, 32 (1st Cir. 1986) (noting that majority view rejects § 1962(c) vicarious liability and citing *Morley* as one of two minority-view). This court finds the reasoning rejecting the *Morley* and *Tyco Trucking* approach to be more persuasive.

Cir. 1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291 (1985); *D & S Auto Parts v. Schwartz*, 838 F.2d 964, 967-68 (7th Cir.) *cert. den.* 108 S.Ct. 2833 (1988); *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987) (no vicarious liability under § 1962(c) where corporation was victim of its agent).[6] Other courts have explained this limit on 1962(c) liability as being based on "the Congressional scheme to orient § 1962(c) liability toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances." *Hirsch*, 751 F.2d at 634; *see also Rose v. Bartle*, 871 F.2d 331 (3rd Cir. 1989). In illuminating this rationale further, the court said: "We... held [in *Hirsch*] that § 1962(c) was intended to govern only those instances in which an 'innocent' or 'passive' corporation is victimized by the RICO 'persons', and either drained of its own money or used as a passive tool to extract money from third parities." *Petro-Tech Inc. v. Western Co. of North America*, 824 F.2d 1349, 1359 (3rd 1987).

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6. Another possible approach to vicarious liability focuses more on agency. This two-pronged analysis focuses on whether the employee's acts were (1) within the scope of employment, and (2) done with the intent to benefit the principal or corporation. *See, e.g., United States v. Cincotta*, 689 F.2d 238, 240-41 (1st Cir.), *cert. denied*, 459 U.S. 991, 103 S.Ct. 347 (1982). While some courts have endorsed corporate liability when the corporate owners or sufficiently high-ranking corporate officers cause a corporation to violate RICO, see *Ashland Oil Inc. v. Arnett*, 875 F.2d 1271, 1280-81 (7th Cir. 1989), the precedent also strongly disapproves of claims that non-policymaking employees associated with their corporate employers make up an enterprise in fact. *Ash v. Wallenmeyer*, 879 F.2d 272, 276-77 (7th Cir. 1989). However, this court, like a number of others, finds that the "flaw in this approach is that it is no more that a recasting of the argument for direct liability." *Schofield*, 793 F.2d at 33; *Greyhound Financial Corporation v. Willyard*, No. 87-C-0811B (D. Utah Dec. 23, 1989, slip. op. at 23) (available March 22, 1990, on LEXIS, Genfed library, Currnt file).

Appendix G

The present case presents a twist on most of the cases addressing respondent superior liability under § 1962(c). Many of the cases have addressed the distinction between "persons" and "enterprises" under the RICO statutory scheme. Here, the corporation is not alleged to be the enterprise but instead is alleged to be a "person" who is liable under RICO. However, in a lawsuit similar to the present one, another court concluded that although "in this case Plaintiff alleges that the corporation in question is itself a liable 'person,' we do not think this changes the analysis as to whether that corporation can be held vicariously liable for acts of an employee— in this case, another alleged liable 'person.' " *Village of Fox Lake v. Waste Management of Illinois, Inc.*, No. 86-C-4888 (N.D. Ill. March 2, 1987) (available March 22, 1990, on LEXIS, Genfed library, Currnt file). In finding that respondeat superior in the RICO context would disrupt the statutory scheme, the *Fox Lake* court said that liability is directed at violators of the statute, and that the "violator is the 'person' that has engaged in the unlawful conduct." *Id.* at 4; *accord Greyhound Financial Corporation v. Willyard*, No. 87-C-0811B (D.C. Utah Dec. 23, 1989) (available March 22, 1990, on LEXIS, Genfed library, Currnt file) (declining to adopt respondeat superior in a case similar to the present one because that would disrupt the explicit statutory scheme of § 1962(c)). In light of these principles, respondeat superior liability should be precluded, not only where the corporation-employer is alleged to be the enterprise, but also where the corporation-employer is alleged to be a "person" within an associated-in-fact enterprise. *See, e.g., Banque Worms v. Luis A. Duque Pena e. Hijos, Ltda.*, 652 F. Supp. 770, 773 (S.D.N.Y. 1986); *Ash v. Wallenmeyer*, 879 F.2d 272, 275-76 (7th Cir. 1989). In naming HHB&T in the complaint instead of Feaster, the plaintiffs seek to circumvent the rule against respondeat superior. All of the wrongful acts attributed to

HHB&T were performed by one employee, Mark Feaster. *See* Complaint ¶ ¶ 45, 47, 48, 52, 54, 56. Since HHB&T could not be vicariously liable were Feaster's liability established at trial, HHB&T should not have liability imputed to it merely by naming the bank itself as a member of the enterprise based solely on Feaster's acts. Therefore, HHB&T will not be held liable under a respondeat superior theory for the plaintiffs' 1962 (c) claim.

Furthermore, nothing in the compliant indicates that, apart from Feaster's conduct, HHB&T itself was involved in the affairs of the alleged enterprise or that it authorized or endorsed Feaster's activities. In fact, Feaster sought to conceal from HHB&T that Roche of Swiss-American had paid Feaster $40,000 for a worthless stock-option. HHB&T is both the victim and the passive instrument of the wrongdoing of others. Therefore, it would clearly not be reasonable to hold it liable using respondeat superior under § 1962(c).

In addition to bringing the RICO action under 1962(c), plaintiffs have also alleged a RICO conspiracy. 18 U.S.C. 1962(d). The court has ruled that plaintiffs' substantive RICO claim against HHB&T under § 1962(c) must be dismissed for failure to plead a pattern as well as for failure to plead an enterprise. Where the underlying § 1962 claims must be dismissed for failure to plead these elements, the RICO conspiracy claim under § 1962(d) also must be dismissed. *See Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1137 (7th Cir. 1986), *cert. denied*, 108 S.Ct. 2004 (1988) (affirming dismissal of RICO conspiracy where plaintiff had failed to identify "enterprise"); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1072-73 (4th Cir. 1987) *cert. den.* 484 U.S. 1089 (1988) (affirming district court's dismissal of RICO dismissal of 1962(c)

cause of action, and apparently also the 1962(d) conspiracy count, because the court found the evidence did "not amount to a pattern of racketeering activity").[7]

THE STATE LAW CLAIMS

Although the court will dismiss the RICO counts with respect to HHB&T, the court retains jurisdiction because of diversity of citizenship. HHB&T has also moved to dismiss the state law causes of action asserted against it. The first of these counts is based on the South Carolina Unfair Trade Practices Act (SCUTPA).

THE UNFAIR TRADE PRACTICE CLAIM

SCUTPA declares unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce...." S. C. Code Ann. §39-5-20(a) (Law. Co-op. Pub. Co. 1985). Section 39-5-140(a) creates a private right of action in favor of anyone who suffers an ascertainable loss as the result of an act declared unlawful by §39-5-20 so long as the unlawful acts adversely impacts the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors, Inc.*, 351 S.E.2d 347 (S.C. App. 1986).

HHB&T contends that the plaintiffs' SCUTPA count should be dismissed because the plaintiffs have both not pled a situation sufficiently implicating the "public interest" and failed to allege "practices in the conduct of any trade or commerce." In response to the first contention, plaintiffs say: "It cannot be said as a

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7. Just as the court found that the plaintiffs had stated a valid RICO cause of action against Benn and Corporation House, the court finds that the plaintiffs have stated a valid RICO conspiracy count against Benn and Corporation House.

matter of law that the transgressions in question here have, by their intrinsic nature, or by reasons inherent in the circumstances of their commission, no potential for repetition." *Plaintiff's Opposition to Motion to Dismiss at 24.*

With respect to HHB&T's contention that the public interest has not been sufficiently involved here, the rule in South Carolina is that an unfair practice that affects only the parties to a particular transaction and not the public interest is "beyond the [Unfair Trade Practice] act's embrace." *Noack,* 351 S.E.2d at 349-50; *Steurer v. National Medical Enterprises, Inc.* 672 F. Supp. 1489, (D.S.C. 1987). An act has an effect on the public interest when it has a "potential for repetition." *Noack,* 351 S.E.2d at 351; *South Carolina Nat. Bank v. Silks*, 367 S.E.2d 421, 423 (S.C.App. 1988) (mere breach of contract does not implicate the public interest and therefore does not violate SCUTPA). The court has also noted that "...it is possible for the adverse impact on public interest to be based on a private injury..." *Florence Paper Co. v. Orphan*, 379 S.E.2d 289, 291 (S.C. 1989).

In another recent SCUTPA case, the court found that the public interest had been implicated. *Haley v. Nursery Co., Inc. v. Forrest*, 381 S.E.2d 906, 908-09 (1989). The *Haley Nursery* case focused on a nursery that put out warranties, which were received by all customers, and price catalogues which contained inaccuracies. *Id.* at 908. The court concluded: "Haley's breach of warranty impacts on the public interest because of the potential for repetition by publication of these misrepresentations to other consumers." *Id.* at 908-09; *see also McTeer v. Provident Life and Acc. Ins.*, 712 F.Supp. 512, 516 (D.S.C. 1989) (court found that the transaction implicated the public interest where the party pled the public interest was implicated and where party pled

that the acts were the regular way of doing business); *David v. Imperial Chrysler-Plymouth*, 381 S.E.2d 212, 215 (S.C. 1989) (court found potential for repetition was "apparent" where salesman could tell the same kind of misrepresentations to future car buyers). Finally, South Carolina courts have noted that SCUTPA "should be given liberal construction." *Connolly v. People's Life Insurance Co.*, 294 S.C. 355, 364 S.E.2d 475, 477 (Ct.App. 1988). Taking this case law into account as well as the command that SCUTPA should be liberally construed, in the present commercial loan transaction case, it cannot be said as a matter of law that there is no potential for repetition.

HHB&T has also contended that these activities did not involve "trade or commerce." S.C. Code Ann. § 39-5-20. The terms "trade" and "commerce" are specifically defined to "include advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of the State." S.C. Code Ann § 39-5-10(b). Again, the court is mindful that this is not the proof phase. However, it can not be said as a matter of law that plaintiffs' allegations, concerning this failed commercial loan, do not involve "any trade or commerce directly or indirectly affecting the people of the State."[8]

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8. Since Bruce Benn and Corporation House answered instead of contesting personal jurisdiction, this court will address their substantive motion to dismiss. For the most part, they merely join in with the reasoning of HHB&T's motion to dismiss. As to the SCUTPA claim, the plaintiff has alleged that Benn and Corporation House have been involved with all the other defendants except HHB&T in a continuing scheme to defraud people other than the plaintiff. Complaint ¶ 73. If the proof will support this allegation, there would clearly be a sufficient impact on the public interest to allow this cause of action to proceed. Therefore, the SCUTPA action will not be dismissed against Benn and Corporation House.

Appendix G

THE CONVERSION CLAIM

On this one claim, the HHB&T has moved for partial summary judgment. The issue in determining a motion for summary judgment is whether there exists a genuine issue of material fact. Fed.R.Civ.P. 56.

> Of course a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of genuine issue of material fact.

Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Though this initial responsibility rests with the moving party, when a motion for summary judgment is made and supported as provided in Rule 56, the non-moving party must produce "specific facts showing that there is a genuine issue for trial," rather than resting upon the bald assertion contained in the pleadings. Fed.R.Civ.P. 56(e); *see Celotex*, 477 U.S. at 327.

Thus,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence

> of an element of that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue of material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. at 322-23.

Under South Carolina law, to prevail on a conversion claim, a plaintiff must establish either title or the right to possess the property when it was converted. *See Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116, 119 (1975); *Steele v. Victory Savings Bank*, 295 S.C. 290, 368 S.E.2d 91, 94 (Ct. App. 1988). Assuming that the plaintiffs have stated a claim for conversion, the defendants are nevertheless entitled to summary judgement on that claim. The subject of the conversion claim is the $550,000 that Young had his Dallas bank wire to HHB&T on September of 1988. Before the funds were ever wired to HHB&T, the parties entered into a written escrow agreement governing the disposition of the $550,000. That agreement, dated September 23, 1988, was signed by HHB&T and plaintiffs' Dallas bank, and it contained four provisions which had to be met before HHB&T could wire the $550,000 to SAFIG. Each of these four conditions were satisfied before HHB&T released the money to SAFIG. The plaintiffs do not

dispute the existence of the escrow agreement or HHB&T's compliance with each one of its terms. Plaintiffs have contended first that Mr. Young was ignorant of the contents of the escrow agreement and next that he did not understand this two page agreement. Even if this were relevant, the plaintiffs have not submitted an affidavit from Young to oppose this summary judgement motion, and HHB&T even noted this lack of an affidavit in a reply memorandum.

In looking at the entire situation, HHB&T acted with authority when it transferred the money to SAFIG. The events make it clear that HHB&T did not convert and secretly transfer the $550,000. To support their summary judgement motion on this count, the defendants submitted the affidavit of George H. Strickland Jr., a Vice Chairman and trust officer of the bank. The plaintiffs did not submit any proof to oppose HHB&T's submissions. However, "a party may not merely rely on the pleadings to create an issue of fact." *Kirkland v. Cooper*, 438 F.Supp. 808 (D.S.C. 1977). In fact, it is well settled in this circuit that a non-moving party, when faced with a motion for summary judgement, "[m]ay not rest upon the mere allegations or denials of his pleadings, but his response by affidavits or as otherwise provided by [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." *U.S. v. One 1976 Lincoln Continental Mark IV*, 578 F.Supp. 402, 403 n.7 (S.D.W. Va. 1984), *quoting Hoyle v. Southern Bell Telephone and Telegraph Co.*, 474 F.Supp. 1350, 1353-54 (W.D.N.C. 1979) *aff'd* 631 F.2d 728 (4th Cir. 1980), and *White v. Boyle*, 538 F.2d 1077, 1079 (4th Cir. 1976). In sum, HHB&T did everything it was told to do according to instructions in the Escrow agreement, and the plaintiffs have not submitted any proof to oppose this partial summary judgement motion.

Therefore, the court will grant the motion with respect to this claim.[9]

THE FRAUD CLAIM

In order to prove fraud under South Carolina law, a plaintiff must show the following elements: 1) a representation; 2) its falsity; 3) its materiality; 4) knowledge of its falsity; 5) intent that the representation be acted upon; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance of its truth; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury. *O'Shields v. Southern Mountain Mobile Homes, Inc.*, 262 S.C. 276, 204 S.E.2d 50, 52 (1974). HHB&T seeks to dismiss the plaintiffs' cause of action for fraud on two grounds. HHB&T contends that the plaintiffs had no right to rely on the representations of HHB&T made by Mark Feaster. HHB&T further contends that the plaintiffs were not ignorant of the falsity of the representations made to him. As to the first point, however, the plaintiffs may be able to show there was a fiduciary relationship between the plaintiffs and HHB&T. Since the plaintiffs may be able to show this relationship, their fraud count will not be dismissed pursuant to the rule of *Florentine Corp. v. Peda I. Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985) (Jury verdict overturned in fraud case where the court found no "right to rely" in part because there was no confidential or

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9. Benn and Corporation House also seek to dismiss the conversion count against them. The subject of this count against Benn and Corporation House is the fees they collected for supposedly arranging financing. The complaint alleges that Benn arranged for Roche of SAFIG to help provide the financing of the deal. Complaint ¶ 18. The complaint also alleges that Roche and Benn tricked the plaintiff into paying a fee for this financing because they did not intend to provide financing. The proof of these allegations must come later. However, the court will not dismiss this count against Benn and Corporation House.

fiduciary relationship). HHB&T correctly points out that plaintiffs appear to want to receive the benefit of this escrow agreement and, at the same time, disavow any of the plaintiffs' knowledge of the agreement. The court finds this a little strange. However, the proof could show that, if a fiduciary relationship can be established, HHB&T did not adequately fulfill its duties.

HHB&T also contends that the plaintiffs were not ignorant of the falsity of the representations and that his claim should be dismissed. *See, e.g., King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125, 128 (Ct. App. 1984). The complaint sets forth six fraudulent representations made by HHB&T through Feaster. *See* Complaint ¶¶ 45, 47, 48, 52, 54, 66. The first representation occurred on or about December 28, 1988. Three months earlier, on September 16, Young had delivered a $550,000 Letter of Credit to SAFIG and had been assured by defendant Roche that it "could not be presented for payment (cashed) until the surety bond (insurance policy) was issued." Compliant ¶ 24. Less than one week later, according to the Complaint, defendant SAFIG assigned the Letter of Credit to defendant First Pacific, whose co-owner, defendant Francuilli, attempted to present it for payment. Despite this bizarre twist of events, the plaintiffs continued to do business with Roche and to rely on his representations.

The complaint also targets representations made by HHB&T through Feaster starting on February 17, 1989, to the effect that SAFIG had sufficient funds there to repay the $550,000. These representations came after the plaintiffs were informed by HHB&T's cashier that "funds were not available to pay the [SAFIG] Letter of Credit No. 088." Complaint ¶ 51. In fact, the plaintiffs were twice told that SAFIG did not have funds on deposit to pay the Letter of Credit, yet he continued pursuing

the deal. Given this information, the court finds that there were a lot of signals of trouble, especially when viewing the events in retrospect. However, the court is not prepared at this time to say that the plaintiffs' fraud count should fail because proper heed was not paid to the sum total of these events. Therefore, the court will deny the motion to dismiss with respect to fraud count.[10]

THE CIVIL CONSPIRACY CLAIM

A plaintiff wishing to prove a civil conspiracy under South Carolina law must show a combination between two or more persons to injure the plaintiff and one or more overt acts done pursuant to the combination. *See, e.g., Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379, 382 (Ct. App. 1986). HHB&T seeks to dismiss this count because it contends that the claim is "duplicative" of the other causes of action based on *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981). In *Todd*, the court ruled that a plaintiff may not recover separate damages for both a tortious act and a conspiracy to do the tortious act. In the present case, however, the plaintiffs seek a single recovery based on multiple causes of action, joining as alternative claims as many claims as the plaintiffs may have against the opposing parties. *See* Federal Rule of Civil Procedure 8. This recovery may be accomplished by permitting proof of multiple claims even though only a single

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10. Benn and Corporation House also seek dismissal of the Fraud count against them. Benn and Corporation House say that they are being sued here only because the financing proposal did not succeed. However, the plaintiffs have alleged, and the court must assume their allegations to be true for this motion, that Benn lied to them about what he was going to do, what he was doing, what he did, and what he had done. This is not the proof phase of the case. These allegations are sufficient to state a cause of action.

injury has resulted. *See Harper v. Ethridge,* 290 S.C. 112, 121, 348 S.E.2d 374 (Ct. App. 1986) (recognizing that under South Carolina Rules of civil procedure a party may assert multiple claims for a single injury). In this case, liability may exist with regard to conspiracy to perform a tortious act as well as for the tortious act itself even though only one recovery is available. *See Yaeger v. Murphy*, 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987) (causes of action for conspiracy to assault and actual assault and battery submitted to jury). Therefore, the court will not dismiss the plaintiffs' cause of action for civil conspiracy as to either HHB&T, Bruce Benn or Corporation House.[11]

THE WRONGFUL DISHONOR CLAIM

HHB&T contends that this count should be dismissed because HHB&T is not a "confirming bank" on the Letter of Credit. The issuer of a Letter of Credit is obligated to honor a demand for payment under that letter if that complies with the terms of the letter. S.C. Code Ann. § 36-5-114; *Airline Reporting Corp. v. First National Bank*, 832 F.2d 823 (4th Cir. 1987). HHB&T is not the "issuing bank." However, the Uniform Customs and Practice for Documentary Credits ("UPC"), which is incorporated into this letter of credit by reference, helps delineate the relationships among the various parties to the Letter of Credit. The UPC states: "[U]nless the nominated bank is the issuing bank or the confirming bank, its

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11. Benn and Corporation House also seek dismissal of the breach of contract cause of action. The complaint shows that Benn constantly assured the plaintiff that his money would be returned from one source or another, specifically undertaking to advise the plaintiff "not to worry." Benn thus indicated this guarantee or independent engagement to see that plaintiffs' funds would be returned. Again, this is not the proof phase of this lawsuit. The court will not dismiss these contract causes of action.

nomination by the issuing bank does not constitute an undertaking by the nominated bank to pay, to accept, or to negotiate." The UPC does not define "confirming bank." Therefore, the court will look to the Uniform Commercial Code ("UCC") for guidance. Under the UCC, a confirming bank is defined as "a bank which engages either that it will itself honor a credit already issued by another bank or that such credit will be honored by the issuer of a third bank."

By confirming a credit, the confirming bank "becomes directly obligated on the credit to the extent of its confirmation as though it were its issuer and acquires the rights of the issuer." S.C. Code Ann. § 36-5-107(2). Under S.C. Code Ann § 36-5-104(1), a confirmation must be in writing and signed by the confirming bank. "Signed" is defined to include "any symbol executed or adopted by a party with present intention to authenticate a writing." S.C. Code Ann. § 36-1-201(39). While a letterhead may be sufficient for a signature, the official comment says: "The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing." In the present case, requests were made to HHB&T for official "confirmation" of the credit. In response to these requests, HHB&T, through Vice President Mark Feaster, sent two letters to the plaintiffs' Dallas bank. HHB&T contends that these two letters were not proper confirmation. The January 9, 1989, letter says that it "hereby acknowledge[s] receipt and confirmation of the attached documentation," although those documents have not been produced. As to the letter of January 20, 1989, there is no signature in the space left for one. The letter is, however, on HHB&T stationary and it follows the sequence of events where the plaintiffs' Dallas bank sought to have the Letter of Credit confirmed. The letter states that it will "hereby confirm Letter of Credit #088 in the amount of

$550,000, issued by Swiss-American Fidelity Insurance Company and Guarantee Limited on December 15, 1988 for the benefit of NorthPark National Bank." HHB&T contends it never confirmed this Letter of Credit. However, based on the forgoing facts and dealings, the plaintiffs have alleged sufficient facts to state a cause of action for wrongful dishonor.[12] Therefore, it is

ORDERED that defendant HHB&T's motion to dismiss be, and it is hereby, granted with respect to the RICO claims, and the wrongful dishonor claim. It is

ORDERED FURTHER that HHB&T's motion to dismiss be, and it is hereby, denied with respect to the claims for the South Carolina Unfair Trade Practices Act, conversion, fraud, and civil conspiracy. It is

ORDERED FURTHER that HHB&T's motion for partial summary judgement with respect to the conversion count be, and it is hereby, granted. It is

ORDERED FURTHER that Benn and Corporation House's motion to dismiss be, and it is hereby, granted with respect to both count eight, the contract count against Roche, SAFIG, Francuilli, Habib and First Pacific as well as count nine, the wrongful dishonor claim against SAFIG, Roche, and HHB&T. It is

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12. The court notes that Benn and Corporation House are not named as defendants in count eight and count nine of the complaint. Since they were not named in those counts, they will obviously not have to defend against those counts. However, as this opinion indicates, there will not be a lack of areas on which they may focus.

Appendix G

ORDERED FURTHER that Benn and Corporation House's motion to dismiss be, and it is hereby, denied in all other respects.

AND IT IS SO ORDERED.

s/ Falcon B. Hawkins
Falcon B. Hawkins
United States District Judge

Charleston, S.C.
April 23, 1990

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED MARCH 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 95-1897
CA-89-1398-9-1
CA-92-308-9-1

ROBERT H. YOUNG; EDX HOLDINGS, INCORPORATED

Plaintiffs - Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A.; FIRST PACIFIC CORPORATION; SWISS-AMERICAN FIDELITY INSURANCE COMPANY AND GUARANTEE, LIMITED; ATTILIO FRANCIULLI; JOHN ROCHE; TOM RUHF; GEORGE STRICKLAND; PRICE WATERHOUSE, Chartered Accountants, a Bahamian Partnership; LEE S. PIPER; HERBERT C. SCHULKEN, JR.; DENNIS J. GOGINSKY, and other possible partners of Price Waterhouse LLP, such as are residents of South Carolina

Defendants - Appellees

and

BRUCE BENN; CORPORATION HOUSE, LIMITED; RAYMOND JONES; WILLIAM RUTH; ALFRED MARTIN; GENERAL BENNETT; TOM WHELAN; CLAUDE

Appendix H

SURFACE; CON FECHER; ED HUGHES; HELEN CORK; WILLIAM EAXLEY; AN GROSSHUESCH; CATHY MCGILL, other possible officers and directors of Hilton Head Bank and Trust Company, N.A., after July 1988, not yet ascertained; HILTON HEAD BANK & TRUST COMPANY, N.A.; TONY HABIB

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

(2)

FILED

SEP 8 1997

CLERK

No. 97-65

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT H. YOUNG, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the common-law doctrine first articulated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), has been statutorily supplanted with respect to claims based on transactions that occurred before the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

2. Whether petitioners' claims against the Federal Deposit Insurance Corporation as receiver of a failed bank are barred by the *D'Oench, Duhme* doctrine as it was applied before the enactment of FIRREA.

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12 U.S.C. 1821(d)(9)(B) 12
12 U.S.C. 1823(e) 4, 5, 6, 7, 8, 9, 10, 11, 13
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ..... *passim*
South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 *et seq.* (Law. Co-op. 1985) 3

Miscellaneous:

62 Fed. Reg. 5984 (1997) 6, 7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-65

ROBERT H. YOUNG, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 103 F.3d 1180. The opinions and orders of the district court (Pet. App. 30a-32a, 33a-48a, 49a-61a, 62a-71a, 89a-119a) are unreported. The district court order of October 16, 1992 (Pet. App. 72a-88a) is reported at 816 F. Supp. 1070.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. A petition for rehearing was denied on March 10, 1997. Pet. App. 120a-121a. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a complicated attempt by petitioners to secure $600 million in financing for the purchase of oil and gas properties. Pet. App. 2a-6a. As directly relevant here, petitioner Young sought to provide security for a loan by entering into a surety contract with Swiss-American Fidelity Insurance Company and Guarantee, Limited (SAFIG). *Id.* at 3a.[1] To fund the deposit required to secure a binder on the surety bond, petitioner Young arranged for Northpark National Bank (NPNB) to issue a $550,000 letter of credit in favor of SAFIG. *Ibid.* The deposit was to be refundable until he authorized issuance of the bond. *Id.* at 4a.

After a related entity unsuccessfully attempted to cash the NPNB letter of credit, SAFIG announced that it would require a cash deposit in order to continue with the transaction. Pet. App. 4a. Petitioner Young then arranged a $550,000 loan from NPNB. *Ibid.* He alleges that he agreed to make the cash deposit only because he was assured (i) that his loan from NPNB would be secured by a letter of credit from SAFIG and (ii) that SAFIG's credit was good because it had $12 million on deposit at Hilton Head Bank & Trust, N.A. (the Bank) under a "Trust Deposit Agreement." *Id.* at 4a-5a. In any event, on September 23, 1988, the parties entered into a written escrow agreement, found among the records of the Bank, under which the Bank served as the intermediary for the exchange of the new $550,000 loan proceeds and the original NPNB letter of credit. See *id.* at 5a, 94a-95a; Pet. 10. SAFIG also issued a letter of

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[1] Petitioner Young is the President and Chief Executive of petitioner EDX Holdings, Inc. Pet. App. 2a n.1.

credit for $550,000 in favor of NPNB, payable through the Bank. Pet. App. 4a.

Petitioners contend that, in connection with those transactions, the parties orally agreed that the proceeds of the NPNB loan would remain on deposit at the Bank until SAFIG issued the surety bond, and that the Bank would issue its own letter of credit to secure the $550,000. Pet. 10; Pet. App. 5a. Neither of those alleged agreements is reflected in the escrow papers or in any other document. Pet. App. 5a. In fact, the Bank was directed to transfer the $550,000 to SAFIG, which it did. *Id.* at 5a, 95a. There is no dispute that the transfer was consistent with the terms of the written escrow agreement. *Id.* at 5a. Petitioners also contend that in January 1989 the Bank "confirmed," or agreed to be directly liable on, the letter of credit issued by SAFIG. *Id.* at 6a. Neither the SAFIG letter of credit nor the Bank's purported confirmations were found in the Bank's records. *Ibid.*

Petitioner Young defaulted on his loan to NPNB. Pet. App. 5a. NPNB attempted to collect on the SAFIG letter of credit, but the Bank refused to honor it on the ground that SAFIG did not have sufficient funds on deposit with the Bank. *Id.* at 6a, 96a-97a. Petitioner Young then repaid the NPNB loan. See Pet. 13.

2. Petitioners sued the Bank and various other parties involved in the abortive financing. Pet. App. 6a-7a. Among other claims, petitioners alleged that the Bank was liable for wrongful dishonor of the letter of credit, violation of the South Carolina Unfair Trade Practices Act (SCUTPA), conspiracy and fraud. *Ibid.*

In August 1991 the Bank was declared insolvent, and the Federal Deposit Insurance Corporation (FDIC) was appointed as its receiver. Pet. App. 6a n.2. Because all of the claims then pending against the Bank relied on alleged oral agreements, understandings, or representations, or on documents not found in the Bank's own books and records, the FDIC moved for summary judgment on the ground that such claims were barred by the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and by 12 U.S.C. 1823(e).

The district court initially held that *D'Oench* barred any claim for fraud based on unwritten agreements and understandings surrounding the written escrow agreement (Pet. App. 66a), the wrongful dishonor claim based on purported confirmations not found in the Bank's records (*id.* at 69a-70a), and the civil conspiracy based on an alleged but unrecorded agreement to defraud petitioners (*id.* at 66a-67a). The court declined, however, to grant judgment for the FDIC on other claims. *Id.* at 64a-66a, 68a. On the FDIC's motion for reconsideration, the court further held that petitioners' claim under SCUTPA was barred because the only "trade practice" alleged in the complaint was dishonoring SAFIG's letter of credit, a claim barred by *D'Oench*. *Id.* at 56a. In addition, the court found that, even if *D'Oench* did not bar the wrongful dishonor and SCUTPA claims, those claims would fail as a matter of state law. *Id.* at 59a. The court declined to bar petitioners' fraud claim under *D'Oench*, but it indicated that it would certify that issue for interlocutory appeal. *Id.* at 50a-54a. At the same time, the court withdrew its previous judgment on petitioners' conspiracy claim, indicating that

it would certify that issue for appeal as well. *Id.* at 60a.

In December 1994, however, the district court instead granted summary judgment on the remaining fraud and civil conspiracy claims under South Carolina law. Pet. App. 39a-43a. The court held that petitioners could not recover on the remaining fraud claim because there was no fiduciary relationship between petitioners and the Bank officer they claimed had misled them, and because they could not reasonably have relied on the representations allegedly made to them concerning SAFIG's financial condition or the funds it had on deposit at the Bank. *Id.* at 40a-42a. Similarly, the court held that petitioners had failed to adduce evidence to prove the elements of a civil conspiracy under South Carolina law. *Id.* at 42a-43a.

3. The court of appeals affirmed. Pet. App. 1a-29a. The court agreed that petitioners' claims of fraud in connection with the escrow agreement, wrongful dishonor of the SAFIG letter of credit, and violation of SCUTPA were all barred by the *D'Oench* doctrine. *Id.* at 9a-16a. The court rejected petitioners' arguments that *D'Oench* should not apply either because they were innocent of any misconduct (*id.* at 13a-14a) or because their claims were not linked to a specific Bank asset (*id.* at 15a-16a). Because the court found that the common-law *D'Oench* doctrine barred petitioners' claims, it did not address either the potential application of 12 U.S.C. 1823(e) or the district court's alternative state-law grounds for granting summary judgment on the wrongful dishonor and SCUTPA claims. Pet. App. 15a, 16a n.4. The court did affirm the district court's judgment on the civil conspiracy and fraudulent misrepresentation claims as a matter

of state law (although on grounds different from those on which the district court relied), and it therefore did not address whether the *D'Oench* doctrine would also bar those claims. *Id.* at 16a-18a & n.5.

ARGUMENT

1. Petitioners argue primarily (Pet. 17, 19-25) that this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), suggest that the federal common-law doctrine established by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), was wholly supplanted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which amended and expanded 12 U.S.C. 1823(e) and first enacted 12 U.S.C. 1821(d)(9)(A). See generally App., *infra*, 1a-3a (describing history of *D'Oench* and the enactment of FIRREA); see FDIC Br. in Opp. at 2-6, *Hess* v. *FDIC*, 117 S. Ct. 760 (1997) (No. 96-106);[2] compare Pet. App. 11a and *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, No. 93-4634, 1997 WL 473101, at *4 (11th Cir. Aug. 20, 1997) (*Motorcity II*) ("Congress did not intend FIRREA to displace the *D'Oench* doctrine"), with *Ledo Financial Corp.* v. *Summers*, No. 94-56296, 1997 WL 472077, at *3-*4 (9th Cir. Aug. 20, 1997) (*Atherton* and *O'Melveney* preclude continued application of common-law *D'Oench* doctrine), *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995), and *Murphy* v. *FDIC*, 61 F.3d 34, 38-40 (D.C. Cir. 1995). This case does not present that issue.

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[2] We have provided petitioners with a copy of our brief in opposition in *Hess*.

Petitioners' claims are based on unwritten agreements, understandings, or representations allegedly made by the Bank or its officers in 1988 and early 1989, before FIRREA was enacted. See Pet. 10-13. Whether or not FIRREA supplanted *D'Oench* completely with respect to defenses or claims based on unwritten agreements allegedly entered into after FIRREA's enactment, it cannot be said to have supplanted the previously existing common law with respect to defenses or claims that are based on unwritten agreements that predate FIRREA, because the relevant statutory provisions added or amended by FIRREA, 12 U.S.C. 1821(d)(9) and 1823(e) (as amended), do not govern transactions that occurred before they were enacted.

As the FDIC explained in a Statement of Policy issued in February 1997, 62 Fed. Reg. 5984 (reprinted at App., *infra*, 1a-8a), no provision of FIRREA addresses the temporal reach of new Section 1821(d)(9) or amended Section 1823(e), and application of those provisions to agreements made before the statute was enacted would alter the rights that the parties to those agreements possessed when they acted.[3] Under

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[3] Before FIRREA, a borrower could assert an affirmative claim against the FDIC, or a defense against the FDIC as receiver, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of Section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460. For example, a borrower could rely on a written agreement executed by the bank's president but not approved by its board of directors or loan committee. Application of Section 1821(d)(9) and the expanded version of Section 1823(e) (as amended by FIRREA) would retroactively eliminate that right.

the principles articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), Congress must therefore be presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA. See App., *infra*, 6a-7a. Agreements made before that time, including the purported agreements or representations on which petitioners rely, are subject to pre-FIRREA law, including the federal common law then well established under *D'Oench*.[4]

Petitioners suggest in passing (Pet. 17 n.10, 19-20) that *D'Oench* might have been supplanted 39 years before the enactment of FIRREA, when Section 1823(e) was first enacted. Petitioners did not present that argument in the court of appeals, and it may not appropriately be raised for the first time in this Court.[5] Even if it were properly presented, however,

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[4] If Section 1821(d)(9)(A), which was added by FIRREA, did apply to this case, it would bar petitioners' claims. That Section provides in pertinent part that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC in its corporate capacity]." See App., *infra*, 4a-5a (discussing applicability of Section 1821(d)(9)(A) to purported liabilities of a failed institution). Petitioners do not claim that the alleged agreement by the Bank to stand behind SAFIG's letter of credit meets the requirements enumerated in Section 1823(e).

[5] Similarly, petitioners, who first raised the matter in their petition for rehearing in the court of appeals, did not adequately preserve any argument (see Pet. 22-23) that, when the FDIC is acting in its receivership capacity, the federal interest is insufficient to support the application of *D'Oench*. See generally *Ledo Financial Corp.*, 1997 WL 472077, at *3-*4. (Indeed, petitioners did not raise their principal argument until then either.) That argument is therefore not properly presented

the contention is implausible. Unlike FIRREA, the Federal Deposit Insurance Act of 1950 could not be described as comprehensive legislation. Although Section 1823(e) as originally enacted codified the result reached by this Court on the particular facts of *D'Oench*, nothing in the text or history of the 1950 Act suggests a congressional intention to supplant the common-law doctrine entirely. See *Motorcity II*, 1997 WL 473101, at *4 n.6; *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, 83 F.3d 1317, 1332 (11th Cir. 1996) (*Motorcity I*), vacated *sub nom. Hess* v. *FDIC*, 117 S. Ct. 760 (1997), reinstated by *Motorcity II*, *supra*; *FDIC* v. *McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986). In succeeding years, "innumerable cases in every circuit court of appeals * * * held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other." *Motorcity I*, 83 F.3d at 1333; see *id.* at 1325-1326 (collecting cases); FDIC Br. in Opp. at 3-5, *Hess* v.

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for this Court's review. In any event, the argument is without merit. As the Eleventh Circuit indicated in *Motorcity II*, see 1997 WL 473101, at *4, this Court based the *D'Oench* rule on a policy, embodied in the Federal Reserve Act, designed to protect the FDIC from misrepresentations that are made to induce or influence the FDIC's actions as the insurer of bank deposits. That policy is violated at the point where bank examiners would be unable to detect the unrecorded agreement and take prompt protective measures, regardless of the capacity in which the FDIC subsequently appears in litigation. See *Langley* v. *FDIC*, 484 U.S. 86,95 (1987) (construing Section 1823(e)). Moreover, FIRREA specifically amended Section 1823(e) and added Section 1821(d)(0)(A) to bar claims based on unrecorded agreements when the FDIC, acting in its receivership capacity, is a party; as we have noted (see note 4, *supra*), Section 1821(d)(9)(A) would bar petitioners' claims if it were applicable to this case.

FDIC, *supra* (No. 96-106) (same). No court has held that *D'Oench* was supplanted by the original enactment of Section 1823(e), and the overwhelming weight of judicial authority applying and developing the doctrine between 1950 and 1989 argues otherwise.

In any event, even if the *D'Oench* doctrine's application to transactions preceding FIRREA were open to serious question, the matter would not warrant this Court's review. Cases involving oral agreements or representations allegedly made in connection with such transactions comprise a finite set that is rapidly diminishing over time, and the FDIC's recent policy statement makes clear that the FDIC will not assert the common-law *D'Oench* doctrine in cases involving post-FIRREA transactions. See App., *infra*, 7a-8a. Whether the doctrine continues to apply in pre-FIRREA cases is therefore a question of little continuing importance.

2. Petitioners contend that their claims should not be barred under *D'Oench* because they relate to a purported liability of the Bank, rather than to a bank asset; because they do not, in petitioners' view, depend on an agreement with the Bank; and because petitioners were "wholly innocent parties" (Pet. 19), so that it would be inequitable to apply the doctrine to bar their claims. Pet. 15, 17-19, 28-29; see also Pet. 25-27. Those arguments are also of limited importance in view of the FDIC's decision not to assert the non-statutory *D'Oench* doctrine in cases involving post-FIRREA transactions. In any event, none of them has merit.

a. Petitioners would limit *D'Oench* to cases involving identified bank assets (such as a loan agreement that the FDIC seeks to enforce in accordance with its terms) because *D'Oench* itself involved such an asset.

See Pet. 17-18. That contention ignores the logic of the *D'Oench* opinion, which relied on "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [FDIC] insures" (315 U.S. at 457) and "a general policy to protect the institution of banking from * * * secret agreements" (*id.* at 458) that were "designed to deceive the [bank's] creditors or [a] public authority" concerning the bank's financial condition, "or would tend to have that effect" (*id.* at 460). Those policies require that the FDIC have ready access to the information required to determine, accurately and sometimes very quickly, the solvency of any insured institution. Compare *Langley* v. *FDIC*, 484 U.S. 86, 91-92 (1987) (discussing parallel purposes of Section 1823(e)).

Just as it "need[ed] no argument" in *D'Oench* itself "to demonstrate that the integrity of ostensible assets has a direct relation to solvency" (315 U.S. at 461), it needs none to observe that exactly the same concern pertains to accurate disclosure of the bank's liabilities. A bank's balance sheet may be rendered unreliable, to the detriment of regulating authorities (including the FDIC) and the public, as easily by concealing a liability as by overstating the value of an asset: In either case, the result is to increase the difference between the bank's assets and liabilities, which is, by definition, the measure of the institution's capital strength or its insolvency. It would therefore make little sense to interpret *D'Oench* to prohibit one sort of manipulation, while permitting

the other.[6] The court of appeals in this case correctly joined every other court of appeals that has considered the issue in so holding. Pet. App. 14a-16a.[7]

b. Petitioners insist (Pet. 15) that their claims do not depend on any "agreement between [petitioners] and [the Bank], secret or otherwise." See also Pet. 5, 15-16 & n.9, 28-29. That is a surprising contention, because the gist of petitioners' grievance is that they transferred $550,000 to the Bank in reliance on representations that the Bank would ensure the satisfaction of a letter of credit issued by SAFIG (either by backing the letter itself, or by keeping the $550,000 in its possession so that it would be available to satisfy

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[6] Section 1821(d)(9)(A) of Title 12, enacted by FIRREA, likewise applies to claims based on purported bank liabilities unrelated to any specific asset. See generally note 4, *supra*. Subparagraph (B) of the same provision, for example, excepts from the scope of subparagraph (A) a particular type of non-asset-related liability—which would be unnecessary if such liabilities were not subject to subparagraph (A) in the first place.

[7] Petitioners argue (Pet. 26-27) that the Eleventh Circuit's decision in *Vernon* v. *FDIC*, 981 F.2d 1230 (1993), conflicts on this issue with the same court's later decision in *OPS Shopping Center, Inc.* v. *FDIC*, 992 F.2d 306 (1993). That is not correct. As the Eleventh Circuit has made clear, *Vernon* holds only that *D'Oench* does not bar "free-standing" tort claims, such as might arise out of "employment discrimination and automobile accidents"; it does bar all "claims which relate directly to regular banking transactions, memorialization of which should be reflected in regular banking records," even if those claims could be characterized as sounding in tort. *RTC* v. *Dunmar Corp.*, 43 F.3d 587, 594-595 (1995) (en banc), cert. denied, 116 S. Ct. 74 (1995); see also *OPS*, 992 F.2d at 310-311. *OPS* itself applied *D'Oench* to bar tort claims involving "the rights and obligations relating to the issuance of a letter of credit by the bank." *Id.* at 310.

SAFIG's obligation), and that the Bank then wrongfully refused to honor the letter of credit on demand. See, *e.g.*, Pet. 5; Pet. App. 9a, 11a-13a. It is also contrary to this Court's reasoning in *Langley*, which read the word "agreement" in Section 1823(e) (before its amendment by FIRREA) broadly to include a contract that the obligors claimed had been fraudulently induced, and which relied explicitly on *D'Oench*'s reference to any "*scheme or arrangement* whereby the banking authority * * * was likely to be misled." 484 U.S. at 92 (quoting *D'Oench*, 315 U.S. at 460) (emphasis added by *Langley*). Even if petitioners can formulate their allegations to avoid the word "agreement," their claims are directly related to ordinary banking transactions, and allowing them would materially impair the financial position of the Bank as it appeared from the Bank's books and records. *D'Oench* requires no more. See, *e.g.*, *RTC* v. *Dunmar Corp.*, 43 F.3d 587, 593-596 (11th Cir.) (en banc), cert. denied, 116 S. Ct. 74 (1995); *id.* at 595-596 (collecting cases); see note 7, *supra*.[8]

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[8] Petitioners cite only one case in support of their "no agreement" argument (Pet. 16 n.9, 28): *Jones* v. *RTC*, 7 F.3d 1006 (11th Cir. 1993). They fail to note that, in *Dunmar*, *supra*, the full Eleventh Circuit vacated the panel decision in *Jones*, reheard the case en banc, and held that *D'Oench* applied to bar the "tort" claims in that case (which "allege[d] oral agreements that additional monies could be loaned, that extensions could be granted, and that the bank would permit assumption of the mortgage by a qualified buyer"). 43 F.3d at 593. We also note that the court of appeals did not disturb the district court's holdings (Pet. App. 39a-42a, 56a-59a) that petitioners' claims for fraud, wrongful dishonor, and unfair trade practices were insufficient as a matter of state law. Those determinations under state law are independently sufficient to

c. Finally, petitioners argue (Pet. 19) that *D'Oench* does not apply because they are "wholly innocent parties." See Pet. 15-16, 27. A similar argument was rejected in *D'Oench* itself. 315 U.S. at 461. Indeed, *D'Oench* emphasized that the common-law rules it adapted to the context of the FDIC had been applied not only to persons who were "party to the scheme of deception," but also to those who had "no positive idea of committing any fraud upon any one" or even were "very ignorant and ill-informed of the character of the transaction." *Id.* at 458-459. The point of *D'Oench* has never been to punish wrongdoing, but rather to protect the federal deposit insurer and the public. See *id.* at 457, 460. Thus, just as, where *D'Oench* applies, "[p]ublic policy requires that a person who * * * executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced" (*id.* at 459), so too it requires that a person (particularly, as here, a sophisticated businessman) who allows a banking transaction to be documented without specific mention of what he conceives to be a $550,000 liability of the bank in his favor should bear the risk of the bank's failure, at least in preference to the FDIC and the public interests that it represents. Compare *Langley*, 484 U.S. at 92-93; see *FDIC* v. *McCullough*, 911 F.2d 593, 600-601 (11th Cir. 1990) (en banc), cert. denied, 500 U.S. 941 (1991).

Petitioners' contrary argument finds support only in the Ninth Circuit's dated decision in *FDIC* v. *Meo*, 505 F.2d 790 (1974), which has been criticized by other

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support the judgment below, and they do not merit review by this Court.

courts of appeals (see, *e.g.*, Pet. App. 13a-14a; *Dendinger* v. *First Nat'l Corp.*, 16 F.3d 99, 102 (5th Cir. 1994); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1338, 1347 (1st Cir. 1992)) and severely limited by the Ninth Circuit itself (see *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 495-496 & n.2 (1995) ("even if Brookside acted in good faith, by signing the note subject to an unrecorded agreement, [it] lent itself to an arrangement likely to mislead the RTC"). The court below in this case correctly joined the other courts that have rejected the application of any "innocence exception" to the bar imposed by *D'Oench* (Pet. App. 13a-14a), and the matter does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1997

APPENDIX

62 Fed. Reg. 5984

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership

[Monday, February 10, 1997]

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* * * * *

Introduction

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: (1) The statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and (2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an

addendum are "Guidelines For Use of *D'Oench* and Statutory Provisions" (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections.[*]

Background

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protecting FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the "*D'Oench* doctrine".

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, Section 2[13](e), 64 Stat. 889 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97-320, Section 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

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[*] The Guidelines referred to in the text are not reprinted here, but may be found at 62 Fed. Reg. 5985-5988.

In August 1989, as part of the Financial Institution Reform, Recovery and Enforcement Act (FIRREA), Public Law 101-73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

(A) Is in writing,

(B) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) Was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) Has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e)

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)(9)(A)), which states, in relevant part, that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim

against the receiver or the [FDIC in its corporate capacity]."

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,[1] these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (section 1823(e))—is *not* a "requirement" that section 1823(e) imposes on those agreements, which if not "met" renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: (1) Allows federal and state bank examiners to

---

[1] The Guidelines have been in effect since late 1994.

rely on an institution's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley* v. *FDIC*, 484 U.S. 86, 91-92 (1987).

In interpreting the meaning of "agreement" in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: "We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes." *Langley*, 484 U.S. at 92-93. In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases.[2]

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of sec-

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[2] Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. See *John* v. *RTC*, 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen* v. *Sparks*, 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts and, consequently, as discussed *infra*, sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

tion 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA's enactment.[3]

No provision within FIRREA addresses the temporal reach of section 1821(d)(9) or section 1823(e) (as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed by the parties to such agreements.[4] Under the principles articulated by the Supreme Court in *Landgraf*, Congress must therefore be presumed to

---

[3] See *Oklahoma Radio Assocs.* v. *FDIC*, 987 F.2d 685, 695-96, *motion to vacate denied*, 3 F.3d 1436 (10th Cir. 1993); *Murphy* v. *FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting FDIC's concession in that regard).

[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460.

have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[5] Thus, because the statutory provisions establish "a categorical recording scheme" (see *Langley*, 484 U.S. at 95) and *D'Oench* is an equitable doctrine (*id.* 93-95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

---

[5] The retroactivity of FIRREA, however, is not determined on an all-or-nothing basis. There is no "reason to think that all the diverse provisions of the [statute] must be treated uniformly for" purposes of the retroactivity analysis. *Landgraf* v. *USI Film Prods.*, 511 U.S. at 280, 114 S. Ct. at 1505. Moreover, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1499.

FDIC Statement of Policy

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D'Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC's Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, DC, this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,
Executive Secretary.

* * * * *

(3)

Supreme Court, U.S.
FILED
SEP 19 1997
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 97-65

ROBERT H. YOUNG, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE OF THE FEDERAL RESPONDENT TO PETITIONERS' MOTION TO STRIKE RESPONDENT'S BRIEF IN OPPOSITION

The response of the Federal Deposit Insurance Corporation, as receiver, to the petition in this case was due for filing, on one extension, on September 8, 1997. On that date, members of the Solicitor General's staff delivered an appropriate number of copies of respondent's brief to the Clerk of this Court. At the same time, the staff served three copies of the brief on petitioner's counsel of record by placing the same in an envelope, addressed to counsel at the address reflected on the cover of the petition (and on the Court's docketing records), and delivering the same to appropriate personnel of the Department of Justice for deposit in the United States mail, first class postage prepaid. The fact of

6 pp

service is reflected in the Certificate of Service (Exhibit A, infra) filed with the Clerk (and served on counsel) together with the brief, in accordance with Rules 25.7 and 29.5 of the Rules of this Court.

In footnote 2 on page 6 of our brief, we indicated that we would, as a courtesy, provide to petitioners a copy of the government's brief in opposition in No. 96-106, Hess v. FDIC, to which we refer in respondent's brief in opposition in this case. The indicated copy of that brief was, however, inadvertently omitted from the package containing the service copy of respondent's brief. When that omission was noted on September 10, 1997, members of the staff promptly dispatched a copy of the brief in Hess to petitioner's counsel, together with additional copies of respondent's brief in this case. Because of the inadvertent delay, and again as a courtesy, the staff transmitted those additional copies to petitioner's counsel by overnight courier.

It appears from petitioner's motion (at 2) that petitioner's counsel received both the mailed service copies of respondent's brief, and the additional briefs dispatched by private courier, on September 11, 1997. Because briefs filed and served on September 8 would normally have been deposited in the mail toward the end of that day, delivery on September 11 would be consistent with ordinary first class mail service from Washington, D.C., to the offices of petitioner's counsel in Columbia, South Carolina. We note that, to the best of our knowledge, petitioner's counsel did

not at any time contact respondent's counsel to request earlier delivery of a copy of respondent's brief.

Under the circumstances, petitioners' present motion is without merit.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General

SEPTEMBER 1997

EXHIBIT A

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

YOUNG, ROBERT H., ET AL. Petitioners	)	
vs.	)	No. 97-0065
FDIC, ET AL.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION** by first class mail, postage prepaid, on this 8th day of September 1997.

SETH P. WAXMAN
Acting Solicitor General

September 8, 1997

See Attached List

September 8, 1997

Attachment List for Case No. 97-0065

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DISTRIBUTED
SEP 26 1997

ORIGINAL

Supreme Court, U.S.
FILED
SEP 26 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 97-0065

ROBERT H. YOUNG, *ET AL.*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A., *ET AL.*

REPLY OF PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNTIED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners ("Young"), by and through the undersigned counsel, hereby respectfully file this Reply to the Response of the Federal Deposit Insurance Corporation ("FDIC"), dated "September, 1997" and received September 22, 1997.

The FDIC asserts that the package, delivered by a private courier on September 11, 1997, contained courtesy copies of its brief in *Hess v. FDIC*, which brief was referenced in the FDIC's Brief in *Young* and inadvertently omitted from the initial package,

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

19 pp

and that the package contained additional copies of the FDIC's Brief in *Young*. (Response at p. 2).

Firstly, the package did not contain the *Hess* brief, nor has Young received any package containing the *Hess* brief. The package delivered by the courier on September 11th contained three (3) copies of the FDIC's Brief in *Young*. There was no cover letter, no certificate of service, and no other document in the package.

Secondly, if the purpose of the courier was merely to provide copies of the omitted *Hess* brief and if the FDIC thought it had already properly served three (3) copies of its *Young* brief, there would be no reason for the FDIC to provide "additional" copies of its *Young* brief.

Thirdly, neither package contained a cover letter, and the Certificate of Service does not reference the *Hess* brief. Yet, the FDIC asserts the error was "...noted on September 10...". The FDIC does not specify what prompted such discovery.

The FDIC asserts that the "fact" of service is reflected in the Certificate of Service. The Court recognizes that a meter date does not establish the date on which an item is actually deposited in the mail. (Supreme Court Rule 29.2.). Nor does a Certificate of Service. Nor is there any proof that the envelope was deposited with the United States Postal Service "**at** or **before** the time of filing". (emphasis added). (Supreme Court Rule 29.3.).

The FDIC does not dispute that the envelope was not directed to counsel at his "**proper post office address**", in accordance with Supreme Court Rule 29.3. (emphasis added). The cover page of

Young's Brief, prepared by a printer, does not reflect counsel's proper post office address. The signatory page of Young's Brief, prepared by counsel, does reflect counsel's proper post office address, as does his letterhead. Notably, these parties have exchanged correspondence and pleadings for more than five (5) years, during which time, the FDIC has consistently heretofore posted all such documents to counsel's proper post office address.

Finally, the FDIC states that Young did not "request earlier delivery of a copy of respondent's brief". (Response at p. 3). Young did not know the brief had been prepared until his counsel telephoned the Court on the 10th. Young is not required to request compliance with the rules. Young did not seek early delivery, only timely delivery.

As to the "courtesy" of the FDIC in providing copies of the *Hess* brief, Young would assert that any document provided to the Court for its consideration must necessarily be provided to opposing counsel on or before its submission to the Court. Service is a requirement, not a courtesy. The FDIC has asked the Court to consider the *Hess* brief. Had the *Hess* brief been served on the 11th, it would not have been timely served. However, to date, it has not been served at all. [Exhibit No. 1].

Moreover, Young would object to any consideration of the brief in *Hess*, as the FDIC's brief is neither authority nor properly part of the record in *Young*. Certainly, Petitioners are not required to respond to multiple briefs of the FDIC, including briefs in wholly

unrelated cases. This is the fourth time the FDIC has attempted to circumvent the rules and make improper argument.

On October 2, 1996, following oral arguments before the Fourth Circuit Court of Appeals and prior to the court's decision, the FDIC improperly submitted further argument in letter form to the court, citing to authority cited to extensively its brief and at oral argument and even arguing the facts in *Young*. Attached was the thirty-one (31) page Westlaw rendition of an opinion in a 1993 case, cited to by both parties in briefs and oral argument. [Exhibit No. 2 (attachment excluded)]. On October 10, 1997, Young objected. [Exhibit No. 3.].

On October 23, 1996, the FDIC again submitted improper argument in letter form to the court. Incredibly, the FDIC attached its entire brief in another matter to supplement this argument. [Exhibit No. 4 (attachment excluded)]. Again, Young made objection. [Exhibit No. 5].

On March 3, 1997, following the court's decision on the appeal and prior to its decision on Young's Petition for Rehearing, the FDIC yet again submitted improper argument in letter form. Attached were the FDIC's Statement of Policy and a ten (10) page Westlaw rendition of the *Atherton* decision. [Exhibit No. 6 (attachment excluded]. The court had not invited or requested any response to the petition. Young did not object for the reasons set forth in counsel's letter. [Exhibit No. 7]. Young's Petition was denied the same day.

As discussed herein, the FDIC does not appear to believe that it must follow the rules adhered to by other litigants. This is the fourth example of such conduct. Such conduct should not be condoned by this Court, but rather this Court should impose appropriate sanctions.

CONCLUSION

Based upon the foregoing, the *Rules of the Supreme Court of the United States*, the pleadings on file, and exhibits filed and served herein, the FDIC's Brief should be denied filing in the Court, denied submission to and consideration by the Court, and should be stricken in its entirety from the record of the Court. The FDIC's briefs in unrelated matters should be wholly disregarded.

September 22, 1997

George H. McMaster
Counsel of Record

Nelda T. Smyrl
Of Counsel

1400 Main Street, Fourth Floor
Post Office Box 7337
Columbia, South Carolina 29202
(803) 799-4499

Counsel for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 97-0065

ROBERT H. YOUNG, *ET AL.*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A., *ET AL.*

AFFIDAVIT OF NELDA T. SMYRL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNTIED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PERSONALLY appeared before me NELDA T. SMYRL, who having been duly sworn, deposes and says:

1. That she personally received and opened the package from the FDIC, delivered by a private courier on September 11, 1997;

2. That the package contained three (3) FDIC Briefs in the *Young* case;

3. That the package did not contain a cover letter, a certificate of service, copies of the *Hess* brief, or any other

PLAINTIFF'S EXHIBIT 1

documents;

4. That neither of the packages, received on September 11, 1997, contained copies of the *Hess* brief; and

5. That, from the filing of the Petition for Certiorari to the present date, no other packages have been received from the FDIC containing copies of the *Hess* brief.

FURTHER, AFFIANT SAYETH NOT.

Nelda T. Smyrl
NELDA T. SMYRL

SWORN to and subscribed before me
this 22nd day of September, 1997

Andrea B Bailey (SEAL)
Notary Public for South Carolina

My Commission Expires: Sept. 20, 2005

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429

Legal Division

October 2, 1996

RECEIVED
OCT - 7 1996

BY OVERNIGHT COURIER

Mr. Bert Montague, Clerk
U.S Court of Appeals
for the Fourth Circuit
1100 E. Main St., Fifth Floor
Richmond, VA 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Pursuant to Fed. R. App. P. 28(j), the Federal Deposit Insurance Corporation ("FDIC") hereby submits pertinent and significant authorities which have come to counsel's attention after oral argument which was held on September 25, 1996.

The Panel asked whether the D'Oench doctrine had been applied outside of the lender-borrower context. In OPS Shopping Center, Inc. v. FDIC, 992 F.2d 306 (11th Cir. 1993), the Eleventh Circuit applied the doctrine in a letter of credit context in which neither the party applying for the issuance of the letter of credit nor the beneficiary of it had a lender-borrower (or debtor-creditor) relationship with the issuing bank. Also, the D'Oench doctrine was applied in In re NBW Commercial Paper Litigation, 826 F. Supp. 1448, 1465, 1467, 1470-71 (D. D.C. 1992) to bar claims outside of the lender-borrower context. Specifically, D'Oench barred claims related to the sale of commercial paper. These authorities support the position of the FDIC at oral argument that D'Oench is not limited to debtor-creditor relationships.

Moreover, in Motorcity of Jacksonville, Ltd. v. FDIC, ____ F.3d _____, 1996 WL 230052, *15-16 (11th Cir. May 8, 1996) (en banc), the Eleventh Circuit concluded that D'Oench applies to any claim, including a tort claim, that is "sufficiently intertwined" with a "regular banking transaction"; or, put slightly differently, is "related" to an ordinary banking transaction. This authority supports the position of the FDIC at oral argument that D'Oench bars the wrongful dishonor claim as well as the fraudulent misrepresentation and civil conspiracy claims because they are directly related to appellants' failure to record the whole agreement that the parties made prior to the $550,000 being transfered to Hilton Head Bank & Trust ("HHBT"). App.980-81, 982, 983-84, 876-77). That agreement is reflected in Appellants' Br. at 11-12 and called for HHBT to be responsible on a letter of credit securing the return of the $550,000 in the event the Page

PLAINTIFF'S EXHIBIT 2

surety bond was not issued. The SAFIG letter of credit was issued pursuant to the agreement and, accordingly, is directly related to, and intertwined with, it. App. 881.

Three copies of this letter and copies of the referenced authorities are included herewith. Please distribute this material to the Panel (Hamilton, Murnaghan and Merhige) at your earliest opportunity.

Very truly yours,

JEROME A. MADDEN
Counsel

cc: George Hunter McMaster
1400 Main Street, P.O. Box 7337
Columbia, South Carolina 29202

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OF COUNSEL
GEORGE HUNTER McMASTER*

*ALSO ADMITTED IN TEXAS

FRANK G. TOMPKINS
1874-1956
FRANK G. TOMPKINS, JR.
1908-1973
ELIZABETH F. ELDRIDGE
1894-1975

CHARLESTON OFFICE
(803) 723-0080

CONWAY OFFICE
(803) 248-0043

October 10, 1996

The Honorable Bert M. Montague
Clerk of Court
Fourth Circuit Court of Appeals
U.S. Courthouse Annex, Rm. 501
1100 East Main Street
Richmond, Virginia 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Appellant Young, by and through the undersigned counsel, hereby makes objection to Appellee FDIC's letter of October 2, 1996, which was submitted pursuant to Fed. R. App. P. 28(j).

Young's objections are:

1. Appellee FDIC improperly cited to authority cited to extensively in its Brief and submitted to the Court for consideration prior to oral argument; and

2. Appellee FDIC improperly argues its position in an attempt to amend and/or supplement its oral argument.

Respectfully submitted,

George Hunter McMaster

GHM/san

cc: Jerome A. Madden, Esquire
Brett Feinstein, Esquire
Andrew Plunkett, Esquire
Thornwell F. Sowell, Esquire

PLAINTIFF'S EXHIBIT 3

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429

Legal Division

October 23, 1996

BY OVERNIGHT COURIER

RECEIVED
OCT 28

Mr. Bert Montague, Clerk
U.S Court of Appeals
for the Fourth Circuit
1100 E. Main St., Fifth Floor
Richmond, VA 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

One of the issues raised by appellant in this appeal is whether the Financial Institutions, Reform, Recovery and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, § 101(10), 103 Stat. 187 (1989) displaced the federal common-law doctrine enunciated by the Supreme Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). By way of a Fed. R. App. P. 28(j), we previously brought to the Court's attention the Eleventh Circuit's (en banc) decision in Motorcity of Jacksonville, Ltd. v. FDIC, 83 F.3d 1317 (11th Cir. 1996). In July 1996, the plaintiffs filed a petition with the Supreme Court asking that the Court issue a writ of certiorari to review and reverse the Eleventh Circuit's decision. 65 USLW 3085, (No. 96-106) (U.S. Jul. 22, 1996).

On Friday, October 18, 1996, the FDIC filed a brief in opposition to the petition. See FDIC Br. (attached hereto). Therein, we argue that the Court should deny the petition because: 1) the alleged unwritten agreement was entered into prior to the effective date of FIRREA; 2) under the Court's analysis in Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994), sections 1821(d)(9)(A) and 1823(e) cannot be applied retroactively to pre-FIRREA transactions; and 3) accordingly, FIRREA could not have displaced the D'Oench doctrine for facts presented therein. In short, the issue was not squarely before the court of appeals.

Because the facts here also pre-date FIRREA, FIRREA could not have displaced the D'Oench doctrine for purposes of this case for the same reason.

PLAINTIFF'S EXHIBIT 4

Three copies of this letter and copies of our brief in opposition to the petition for certiorari in Motorcity are included herewith. Please distribute this material to the Panel (Hamilton, Murnaghan and Merhige) at your earliest opportunity.

Very truly yours,

JEROME A. MADDEN
Counsel

cc: All Counsel of Record

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1908-1973
ELIZABETH F. ELDRIDGE
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November 7, 1996

The Honorable Bert M. Montague
Clerk of Court
Fourth Circuit Court of Appeals
U.S. Courthouse Annex, Rm. 501
1100 East Main Street
Richmond, Virginia 23219

Fax ☐ Mail ☐ Fed-Ex ☑ Hand Delivery ☐

To: Bert Young, et

FOR YOUR INFORMATION
This is a copy of a letter or document relative to a matter being handled by us on your behalf and is provided to keep you informed of developments.
You may wish to save it for your records.
TOMPKINS AND McMASTER

cc:_____

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Appellant Young, by and through the undersigned counsel, hereby makes objection to Appellee FDIC's letter of October 23, 1996, supplementing its improper letter of October 2, 1996, both of which were submitted pursuant to *Fed. R. App. P.* 28(j).

Young's objections are:

1. Appellee FDIC improperly cited to authority submitted to the Court for consideration prior to oral argument;

2. Appellee FDIC improperly argues its position in its letter in an attempt to amend and/or supplement its oral argument; and

3. Appellee FDIC improperly argues its position by submitting its twenty-six (26) page brief in another action.

Rule 28(j) allows a party to submit only "... pertinent and significant authority ...", which has come to the party's attention after oral argument. The Rule specifically provides the "... letter shall be submitted without argument ..." (emphasis added).

The FDIC's letter of October 2, 1996 violated the Rule in these respects and was objected to in Plaintiffs' letter of October 10, 1996.

The FDIC's letter of October 23, 1996 improperly cites to authority previously submitted to the Court. The FDIC makes improper argument, not only in its letter, but in its brief from another action, which matter is not authority at all. The FDIC improperly submits to the Court nearly thirty (30) pages of argument, in both letter and brief format.

PLAINTIFF'S EXHIBIT 5

This constitutes a blatant violation of and disregard for the rules of this Court and an attempt to unfairly disadvantage the Plaintiffs, who have not improperly attempted to amend, supplement, or clarify their oral argument. Accordingly, Plaintiffs would request this Court to disregard such improper arguments.

Respectfully submitted,

George Hunter McMaster

GHM/san

cc: Jerome A. Madden, Esquire
Brett Feinstein, Esquire
Andrew Plunkett, Esquire
Thornwell F. Sowell, Esquire

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429

Legal Division

March 3, 1997

BY FEDERAL EXPRESS

Mr. Bert Montague, Clerk
U.S Court of Appeals
for the Fourth Circuit
1100 E. Main St., Fifth Floor
Richmond, VA 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Pursuant to Fed. R. App. P. 28(j), the Federal Deposit Insurance Corporation ("FDIC") hereby submits a statement of policy (62 F.R. 5984) issued by the FDIC on February 10, 1997, subsequent to the Court's decision in this matter on January 10, 1997. This statement sets forth the FDIC's conclusion that sections 1821(d)(9)(A) and 1823(e) (as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")) cannot be applied retroactively to unrecorded agreements that were allegedly entered into prior to FIRREA's effective date, August 9, 1989.

For pre-FIRREA agreements the statement provides that the FDIC will continue to rely on the D'Oench doctrine and, where appropriate, section 1823(e). For post-FIRREA agreements, however, it announces that the FDIC will rely only on section 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar unrecorded agreements, including so-called no-asset agreements. Nevertheless, the background section accompanying the policy statement provides that, in the FDIC's view,

> Congress intended that sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the D'Oench doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the D'Oench doctrine.

62 F.R. at 5984.

Inasmuch as the alleged agreements in this case occurred prior to August 9, 1989, this Court's reliance on D'Oench to bar Mr. Young's claims is fully consistent with the policy statement.

PLAINTIFF'S EXHIBIT 6

Moreover, pursuant to Fed. R. App. P. 28(j), the FDIC hereby submits a copy of the Supreme Court's recent decision in Atherton v. FDIC, 117 S. Ct. 666 (1997). We do not believe that Atherton, which discussed the applicability of pre-Erie "general" federal common law, has any bearing on the Court's post-Erie D'Oench decision, which created a "special" federal common law rule of decision to protect the federal interest. Thus, D'Oench is one of those "few and restricted" circumstances mentioned in Atherton where the federal courts may develop federal rules.

Three copies of this letter and copies of the referenced policy statement and Atherton decision are included herewith. Please distribute this material to the Panel (Hamilton, Murnaghan and Merhige) at your earliest opportunity.

Very truly yours,

JEROME A. MADDEN
Counsel

Enclosures

cc: George Hunter McMaster, Esq.
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All Other Counsel of Record

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March 10, 1997

FAXED 3/10/11

F# 1-0
☐ C ☐ PLEAD ☐ DISC
☐ R ☐ EXH ☐ WORK
CC
INT

Mr. Robert H. Young
EDX Holdings, Inc.
10440 North Central Expressway
Suite 510, Lock Box No. 104
Dallas TX 75231-4104

RE: Robert H. Young, et al. v. Federal Deposit Insurance Corporation, as receiver for Hilton Head Bank and Trust Company, et al.
Civil Action No. D:89-1398-1

RE: Robert H. Young, et al. v. Raymond Jones, et al.
9.92-0308-1AJ

Dear Bob:

Enclosed is the brief of the FDIC.

As this brief was not requested it is improper. I will not object, however, as it is such a poor piece of work I hope the Court reads it.

Yours very truly,

George Hunter McMaster

GHM/lmd
Enclosure
cc: NS

Tell Pleroe read enclosed

PLAINTIFF'S EXHIBIT 7

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September 23, 1997

The Honorable William K. Suter
Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Re: Robert H. Young, *et al.* v. FDIC, *et al.*
No. 97-0065

Dear Mr. Suter:

Enclosed for filing and consideration, please find an original and ten (10) copies of the **Reply of Petitioners** to the Response of the Federal Respondent to Petitioners' Motion to Strike Respondents' Brief in Opposition.

Thank you for your kind assistance.

Respectfully Submitted,

George Hunter McMaster
Counsel of Record

Nelda T. Smyrl
Of Counsel

Counsel for Petitioners

NTS/abb
Enclosure

cc: Seth P. Waxman, Esq.
Andrew Plunkett, Esq.
Brett Allen Feinstein, Esq.
John Roche

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 97-0065

ROBERT H. YOUNG, *ET AL.*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A., *ET AL.*

CERTIFICATE OF SERVICE

I, George Hunter McMaster, do hereby certify that I have served the following attorneys or other parties named with the **Reply of Petitioners**, dated September 22, 1997, by depositing a copy of the same with the United States Postal Service, first class postage prepaid, this day, September 23, 1997, addressed as follows:

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George Hunter McMaster

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